No. _____

In the Supreme Court of
the United States

Mostafa Aram Azadpour
(Petitioner),
v.
Sun Microsystems, Inc.,
Matrix Absence Management, Inc.,
Babu Turumella,
Norman Yeung, and
(Respondents).

On Petition for Writ of Certiorari to
the United States Court of Appeals for
the Ninth Circuit in
San Francisco

Petition for Writ of Certiorari

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In the Supreme Court of the United States

Certificate of Compliance

I, the named *pro se* Petitioner on the attached Petition, pursuant to US Code, Title 28, § 1746 certify that in compliance with the US S.Ct. R. 33.1, et seq., the attached Petition for Writ of Certiorari to the Ninth Circuit in San Francisco is:

Proportionately spaced, has a typeface of <12> points in the body and <10> points in the footnote, with typeset of <Century Schoolbook> and contains <7,329> words in total.

Date: January 27, 2009

M. Aram Azadpour, *pro se* Petitioner

I. Questions Presented

(1) Whether Employee Retirement Income Security Act of 1974, as amended; the United State Code ("USC"), Title 29, § 1001, et seq. ("ERISA") confers original-subject-matter, pendent from which then supplemental, jurisdiction to bring about removal of a non-diversity state-case when a defendant removing the state-case has only an ERISA "conflict-preemption" affirmative-defense available to it.

(2) Whether ERISA "complete-preemption" survives to confer original-subject-matter, pendent from which then confers supplemental, jurisdiction to a US district court over a non-diversity removed state-case; when, a plaintiff voluntarily has-had forfeited his standing (under Title I of ERISA code § 502, et seq.; a.k.a, 29 USC 1132, et seq.), to bring ERISA-section-502 action in any court for all times, and, defendant removing the state-case has no ERISA standing.

(3) Whether a post-fact one-time payment under a colorable claim in ERISA disability-benefit preempts an employer's duty pursuant to Fair Employment & Housing Act, as amended; the California State Government Code § 12900, et seq. ("FEHA") for an inter-active, timely, and in good-faith discussion with an employee who has an aim of return-to-work from a disability covered under FEHA.

II. List of All Parties

Petitioner: M. Aram Azadpour, a natural person appearing *in pro per*. Petitioner was the underlying plaintiff-appellant in lower-courts while appearing *in pro per*, too.

Respondents: **(1)** Sun Microsystems, Inc., appearing thru Counsel from Foster & Associates. A publicly traded corporation incorporated in California; which was former employer of Petitioner and a defendant-appellee in lower courts.
(2) Matrix Absence Management, Inc., appearing thru Counsel of Foster & Associates. A non-publicly traded corporation incorporated in California; a defendant-appellee in lower courts.
(3) Mr. Babu Turumella, appearing thru Counsel of Foster & Associates. A natural person; former direct manger of Petitioner, Sr. Manager at Sun Microsystems, Inc. and a defendant-appellee in lower courts.
(4) Mr. Norman Yeung, appearing thru Counsel of Foster & Associates. A natural person; former direct manager of Mr. Turumella; and a Director at Sun Microsystems, Inc., and a defendant-appellee in lower courts.

III. Table of Contents

IV. Table of Authorities

▪ California Supreme Court Opinion

▪ Ninth Circuit (& USDC within 9th Cir.) Cases

▪ California Sate Cases

V. Opinions Below

The Ninth Circuit's dispositive memorandum may be found at Azadpour v. Sun Microsystems, Inc., et al., 2008 US.App.LEXIS 15076, 9th Cir. (Cal.) (July 11, 2008) (unpublished). *See* App.: "D," *infra*. The US District Court's dispositive orders may be found at Azadpour v. Sun Microsystems, Inc., et al., 2007 WL 988185, N.D.Cal. (April 02, 2007) (slip op). *See* Apps.: "G" & "J," *infra*.

VI. Jurisdiction

The instant Petitioner, pursuant to the following, invokes the jurisdiction of the US Supreme Court under 28 USC 1254(1) for its supervisory and other authorities:

The instant Petitioner is seeking a writ of certiorari to the Ninth Circuit in San Francisco for a discretionary review of Ninth Circuit's dispositive memorandum and mandate in a consolidated appeal, before the Hon. Circuit Judges: John C. Wallace, Michael D. Hawkins, and Sidney R. Thomas, "affirming" the US District Court on all issues (including state-case removal and jurisdictional-defect). *See* Apps.: "A," & "D," *infra*.

The said appeals were taken as matter of right from the final judgments and all interlocutory orders in two state-cases removed from the Superior Court of California for the Santa Clara County in San Jose to the US District Court for the Northern District of California in San Francisco, the Hon. Martin J.

Jenkins; presiding US District Judge. *See* Apps.: "E," "F," "G," "H," "I," & "J," *infra*.

The Ninth Circuit filed its dispositive memorandum on July 11, 2008 (*see* App.: "D," *infra*), and issued its mandate on October 23, 2008 (*see* App.: "A," *infra*). The instant Petitioner, timely, sought a rehearing for panel court and *en banc* court. Petitioner was granted to file his rehearing petition by the Ninth Circuit order filed on September 19, 2008. *See* App.: "C," *infra*. The panel court voted to deny rehearing-petition and no Ninth Circuit Judge requested a vote on rehearing *en banc*, hence, the rehearing-petition was denied by the Ninth Circuit order filed on October 15, 2008. *See* App.: "B," *infra*.

The Petitioner, timely, sought from the Circuit Justice to the Ninth Circuit in the instant Court, the Hon. Anthony M. Kennedy, for an extension of time to file his instant Petition. The Petitioner's application, under application No. (08A584), for extension of time was granted to and inclusive of January 27, 2009.

VII. Constitutional and Statutory Provisions Involved

A.

The § 2, Article III, of the US Constitution in relevant part, to the instant Petition, reads (internal formatting altered):[1]

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[1] The § 2, Article III of US Constitution was the same in its letter as of October of "2005", date of case-removal; it has been unamended as of the signature-date of instant Petition.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States ... between Citizens of different States... between Citizens of the same State claiming Lands under Grants of different States..."

B.

The § 1132, Title 29 of USC in relevant part, to the instant Petition, reads (internal formatting altered):[2]

"(a) Persons empowered to bring a civil action
A civil action may be brought
(1) by a participant or beneficiary
(A) for the relief provided for in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of this plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
...
(e) Jurisdiction
(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under his subchapter brought by the

[2] This is from part 5, Administration and Enforcement, section of ERISA code; a.k.a. § 502 of ERISA code; a.k.a. "conflict-preemption;" a.k.a. affirmative-defense available to a defendant. The letter of said Section was in-effect i.n October of "2005," date of case-removal; it is unamended as of the last codification released by the Office of the Law Revision Counsel; as of January 03, "2007."

Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021 (f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actins under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action."

C.

The § 1144, Title 29 of USC in relevant part, to the instant Petition, reads (internal formatting altered):[3]

"(a) Supersedure; effective date

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[3] This is from part 5, Administration and Enforcement, section of ERISA code; a.k.a. § 514 of ERISA code; a.k.a. "complete-preemption;" a.k.a. jurisdictional cause-of-removal available to a defendant. The letter of said Section was in-effect in October of "2005," date of case-removal; it is unamended as of the last codification released by the Office of the Law Revision Counsel; as of January 03, "2007."

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975."

D.

The § 2105, Title 29 of USC in relevant part, to the instant Petition, reads (internal formatting altered):[4]

> "... in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees..."

E.

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191, 110 Stat. 1936 (codified as amended in various sections of Title 42, USC). The letter of the Act is too voluminous and if need be, will be appended to merit-brief.

F.

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[4] From WARN Act. The letter of said Section was in-effect in October of "2005," date of case-removal; it is unamended as of the last codification released by the Office of the Law Revision Counsel; as of January 03, "2007."

The § 12940, California State Government Code in relevant part, to the instant Petition, reads (internal formatting altered):[5]

> "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
> ...
> (n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition..."

VIII. Statement

1. Summary

The underlying civil-suit commenced at the state court-of-competent in the State of California, the Superior Court of California for the Santa Clara County in San Jose ("State Court of Origin")[6] *in re* employment and discrimination disputes in September of "2005." The Respondents (then

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[5] The letter of this section of FEHA was in-effect and has been unamended ever since the state-case was filed in September of "2005."

[6] Under Case No. 105-CV-048814; unlimited civil-case.

Defendants), timely, removed the state-case in October of "2005" to the US District Court for the Northern District of California ("CAND") in San Francisco, the Hon. Martin J. Jenkins, presiding US District Judge ("Trial Court").[7] The Respondents removed the state-case under assertion of diversity-of-citizenship, federal question, and ERISA complete-preemption (citing from Pilot Life Ins. Co. v. Dedeaux, 481 US 41, 54-55 (1987)).[8] *See* App.: "M," *infra*.

The Petitioner, timely, opposed removal of state-case (by-way of remand-motion) for being a non-diversity case, for want of US district court's subject-matter jurisdiction, lack of preemption of state-cause (for being separable cause over which US district court has-had no original (be it exclusive or concurrent) subject-matter jurisdiction; and state-cause not encroaching on either ERISA-plan administration or ERISA-plan benefit calculation/dispensing), and ERISA code gives expressed "concurrent" subject-matter jurisdiction to state court-of-competent and US district court to hear "and" to adjudicate ERISA-benefit denied cause.

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[7] The removed Case was assigned No. C05-04087-"EDL;" and upon plaintiff's remand-motion, the case was reassigned under No. C05-04087-"MJJ."

[8] Pilot Life Ins. Co. v. Dedeaux has been overruled on other grounds, i.e., ERISA saving-clause, by Kentucky Assn. of Health Plans, Inc. v. Janie A. Miller, 538 US 329 (2003). On grounds of § 502-action being preemptive, there has been many circuit and US Supreme Court opinions, since 1987, narrowing and better defining "relate to" clause of ERISA.

Over the course of the proceedings, the Trial Court's subject-matter jurisdictional-defect grew, as oppose to being cured. Respectfully said, not-only did the Trial Court lacked removal subject-matter jurisdiction, but-also, the Trial Court lacked subject-matter jurisdiction at judgment entry-date, too; and since there never was diversity-of-citizenship; the Trial Court lacked personal-jurisdiction over both, the Respondents and the Petitioner.

No doubt, self thought, Petitioner's understanding of law and court-procedures has measurably improved over the past some four-years dealing with the matter on-hand. However, common-sense, reasoning, and analyses have to be applied, too. The record of all courts below (state-court, US district court, and US court of appeals) "is-what-it-is" and the record well supports granting of the instant Petition (if not justifying summarily reversal of Ninth Circuit with instruction to remand to state-court).

2. Procedural Background

A. [9]

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[9] There were two, separate, state-cases removed. The US district court orders refer to them as First Action (USDC No. C05-04087-MJJ) and Second Action (USDC No. C06-03272-MJJ). However, the US district court, by-way of case-record, treated the cases as separate as it entered "two" judgments (*see* Apps.: "F" & "I").

Petitioner in his papers and filings in lower-courts referred to the removed cases as "C05" and "C06." The court proceedings in C05 were deterministic of jurisdictional defect, and questions brought in the instant Petition; when considering the dates of case-removal and filing-date of controlling order(s) in C05. Hence, little is noted in the instant Petition *in re* C06.

The instant Petitioner filed a complaint, as a *pro se* plaintiff, against the Respondents in State Court of Origin on "September" "13," "2005," alleging eight separate counts of wrongs (directed against each named-defendant separately for a time-duration) with a case-synopsis and a relief sought from court (prayer for relief). *See* App.: "K," *infra.*

In response to the complaint and summons the Petitioner had served, by-way of a licensed process server, upon the agent for service-of-process for all Corporate defendants and at place-of-work upon each natural-person defendant; the Respondent Sun Microsystems, Inc. ("SMI," "Sun," or "SUN"), then a named defendant, on "October" "05," "2005" filed an answer-pleading, thru Counsel of Foster & Associates ("F&A"), in the State Court of Origin. *See* App.: "L," *infra.*

On "October" "11," "2005," F&A filed a notice-of-removal and removed a not well pleaded complaint state-case to the Trial Court. *See* App.: "M," *infra.*

Petitioner filed a, timely, remand-motion[10] asserting lack of diversity-of-citizenship, "separable" causes,

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The Petitioner did "not" serve any defendant in the second state-case (which was filed on "April" "17," "2006;" and, no defendant has put anything in records below to show such a defendant was served, properly, with complaint "and" summons; as required by Fed. R. Civ. P. 4, et seq., and similarly by Title 5 of the California Code of Civil Procedures.

[10] Note that no docket-report is attached, only docket-numbers are stated for documentation and later reference, if need be. *See* C05; Docket ID(22).

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and relevant ERISA-code conferring "concurrent" jurisdiction to a state court-of-competent and a US district court. *See* § VII.B., *supra*.

During the remand-motion hearing[11] the Trial Court concluded no diversity-of-citizenship existed. Then inquired from plaintiff on his state-complaint (*See* App. "O," *infra*, for a re-production of the entire Transcript; internal formatting altered; here is a partial re-production):

> "The Court: [ ] But the concern I have is that you, you know, you may not absolutely comprehend this, but looks to me and we want to talk about this that you have you're seeking a claim for benefits for denial of your long-term disability payments.
> The Plaintiff: May I respond? Your Honor, that's one actionable cause in the case. Pursuant to the denial of the long-term disability there are subsequent actionable causes, one of which is what's governed by the State of California's Fair Employment and Housing Act for failure to participate in an interactive discussion with a good faith aim to accommodate disability as stated by the relevant medical doctors, including the IME, the Independent Medical Examiner, that was hired by the Administrator. Furthermore, there were obstruction of filing for the Workers' Compensation. So it's the totality of that.
> The Court: So let me just make sure I understand.

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[11] *See* C05; Docket ID(47).

The Plaintiff: Yes, Your Honor.
The Court: You have one claim for the denial of disability benefits under their Welfare Plan.
The Plaintiff: Yes, Your Honor.
The Court: Then, you have separate claims for failure to accommodate you in terms of disability discrimination and workers' comp benefits.
The Plaintiff: And then wrongful termination, Your Honor, and subsequent other aspects, one of which is the Federal WARN Act [mistranscribed in Hearing Transcript as "federal workers;" plaintiff timely noted it to the Reporter, she informed plaintiff that at times it is hard to understand plaintiff's accent; a fact that plaintiff agrees with, too], their reduction and the training that was denied, as well.
Again, you're [should have been transcribed as "Your Honor"] absolutely right. I may not comprehend the procedure properly, but in my mind's eye I put them in separate account [should have been transcribed as "count"] per the papers that have been filed, [in] the State. And I have a copy of that entire [case] file here for your review, if you wish to.
The Court: Well, let me hear from Ms. Solomon [Counsel from F&A representing all defendants]. She may have something to weigh in on this.
Ms. Solomon: Well, if the Court is not inclined to deny the motion on the basis of Federal Question Jurisdiction because of an ERISA claim, I would request time to do some discovery.
...
The Court: All right. Okay. So let's talk about whether or not there's a Federal Question here based on what Mr. Azadpour has just said.

Ms. Solomon: I believe there is. I mean, he's admitted that he is seeking disability benefits. It's an ERISA Plan. He hasn't offered any argument that it isn't an ERISA Plan. We put the Plan before the Court. It clearly says it's an ERISA Plan in the Declaration.
The Court: I think she's right on this. That's the problem...[for brevity remainder is not re-produced here, *see* App.: "O," pg(6)]. And you seek to litigate the question of whether or not your benefits were wrongfully stopped or terminated, benefits which flow and require determination as to whether or not they were correct in stopping the benefits under the Welfare Plan that you bring to this Court to be determined.
The Plaintiff: Your Honor, as I cited –
The Court: And that's irrespective of whether or not you have other common law claims or statutory claims.
The Plaintiff: As I cited in my initial motion to remand, the statute, the ERISA has a specific section allowing for that type of a claim that I'm brining to be brought at a state court of competent, which the State Court of California was.
The Court: Right. But I can't decline jurisdiction as a basis for it. I can't grant your motion.
The Plaintiff: Your Honor, their claim, if I understand it, is that they are taking ERISA as the overarching authority here.
The Court: They are asserting the Federal Statute and the claim that arises under a Federal Statute as a basis that allows the case to be brought here in a Court of Limited Jurisdiction and nothing else.

> The Plaintiff: Okay. With that said, the letter of the ERISA as I cited in my motion, in my motion to remand, allows for the plaintiff to choose which venue he or she wishes to file, and the court of competent, which was the Superior Court of California, does, in fact, have a jurisdiction based upon the actual letter of the origin [sic]. The Court: All right. So the Court has heard argument and it will DENY the motion for remand..."

B.

On February "07," "2006," Petitioner filed a motion for leave to amend his state-removed complaint (*see* C05; Docket ID(59)). On February 21, 2006, F&A filed an opposition to the said motion for leave (*see* C05; Docket ID(66)). The Trial Court granted the said motion and filed its grant-order on March 07, 2006 (*see* C05; Docket ID(72)). By stipulation of parties, Petitioner filed his First Amended Complaint ("FAC") on March 29, 2006 (*see* C05; Docket ID(84)). FAC stated that Petitioner will be moving to dismiss with-prejudice any claim arising from, alleged, denied disability benefit whether it was based upon a state-cause or a federal-cause. The said voluntarily dismissal motion was filed on March 29, 2006 (*see* C05; Docket ID(88)). F&A filed a non-opposition notice to the said voluntarily dismissal motion on March 31, 2006 (*see* C05; Docket ID(81)). The Trial Court, unconditionally, granted the said Petitioner's voluntarily dismissal motion and filed its grant-order on April 24, 2006 (*see* C05; Docket ID(101)). *See* App.: "N," pg(1), *infra*.

On April "24," "2006," Petitioner filed a motion to consider question of the Trial Court's subject-matter jurisdiction pursuant to filing of FAC and the said voluntarily dismissal motion (*see* C05; Docket ID(96)). On May 05, 2006, the Trial Court issued a show-cause order to the Respondents (then Defendants) why the case should "not" be remanded for lack of jurisdiction. After receiving response/reply from all parties, the Trial Court denied remand and asserted subject-matter jurisdiction by order filed on June 13, 2006 (*see* C05; Docket ID(130)). *See* App.: "N," pg(2). In the said order the Trial Court reasoned:

> "Although Plaintiff no longer asserts ERISA claims, Plaintiff added federal claims pursuant to HPAA [sic] and the WARN act when he amended his complaint. Therefore, the Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 based upon Plaintiff's federal claims. Accordingly, Plaintiff's Motion to Remand is **DENIED.**"

C.

On September "12," "2006," the Trial Court heard the Respondents' motion for summary judgment ("MSJ"), and, granted judgment in favor of Respondents on September 26, 2006, and, filed judgment on September 26, 2006, and, entered judgment on October 02, 2006 (*see* C05; Docket IDs(211, 213, 218, & 219)). *See* Apps.: "I," & "J," *infra.*

D.

Petitioner, timely, appealed from final judgment in C05. While the appeal from C05 was in progress, C06 reached its final disposition and a final judgment was entered. Petitioner, timely, appealed from final judgment in C06. *See* Apps.: "E," "F," & "G," *infra.*

Then, Petitioner moved to consolidate the two appeals under Dkt Nos. 06-16960 & 07-16556. The Ninth Circuit "affirmed" the Trial Court on all issues, including jurisdictional defect. *See* Apps.: "A," & "D," *infra.*

E.

The Trial Court at entry-date of judgment had no subject-matter jurisdiction, either.[12]

3. Dispositive Rulings & Judgments Below Fail As Matter of Law for Want of Jurisdiction

A. Preservation of question for review

Notwithstanding the well settled point, that a federal court's subject-mater jurisdictional defect is neither waived nor waiveable and that a federal court (at any

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[12] Pursuant to (1) Trial Court order granting Petitioner's voluntarily dismissal-motion (as oppose to stipulation); which expressly, voluntarily, broadly by-intent, and at the outset of removed-case dismissed with-prejudice any/all cause(s) that could reasonably be in ambit of ERISA, and (2) Defendants' "filed" a non-opposition notice; and, then the Trial Court unconditionally granted the said voluntarily-dismissal. *See* §VIII.3, *infra*, for more discussion and citation of legal authorities. *See*, also, C05; Docket IDs(84, 81, 88, & 101).

level, including the instant Court) has a judicial and statutory duty to ensure it has proper jurisdiction to hear "and" to adjudicate a case/matter before it;[13] a plaintiff's timely remand-motion preserves such a plaintiff's objection(s) to removal for an appellate review, including any objection to removal jurisdiction and subject-matter. *See* Caterpillar Inc. v. Lewis, 519 US 61, 64, 74 (1996); and, Associated Builders & Contractors, Inc. v. Local 302 IBEW, 109 F.3d 1353, 9th Cir. (1997).

Neither, merits of a case, nor whether or not a plaintiff may ultimately prevail is of any consideration when determining properness of a removal and removal jurisdictional. *See* Abraham v. Norcal Waste Systems, Inc., 265 F.3d 811, 9th Cir. (2001) ("Abraham" was a state case removed to US district court pursuant to ERISA complete-preemption, after some seven years of litigation, a jury verdict rendered "against" plaintiffs; both parties appealed and cross-appealed; neither party raised removal jurisdictional defect; the 9th Cir. *sua sponte* reviewed plenary the properness of removal, found state-causes had no nexus to an ERISA pension-plan, vacated jury verdict and judgment, and instructed remanded to state-court).

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[13] *See*. Ruhrgas AG v. Marathon Oil Co., 526 US 574, 583 (1999); and, Steel Co. v. Citizens for a Better Env't, 523 US 83, 94-95 (1998); and, Arizonans for Official English v. Arizona, 520 US 43, 73 (1997); and, Bender v. Williamsport Area Sch. Dist., 475 US 534, 541 (1986); and, FW/PBS, Inc. v. City of Dallas, 493 US 215, 231 (1990); and, Great S. Fire Proof Hotel Co. v. Jones, 177 US 449, 453 (1900); and, Abraham v. Norcal Waste Systems, Inc., 265 F.3d 811, 9th Cir. (2001).

Pursuant to the partial of the Remand Hearing record (*see* § VIII.2.A., *supra)* and noting § 502(a) of ERISA code, respectfully said, it is crystal clear that the Trial Court erred as the relevant part of ERISA code gives a "concurrent" jurisdiction to a state court-of-competent and a US district court. Defendants' notice-of-removal put nothing in the record to show that any state-cause was encroaching on ERISA's protected domain, or, was depending on existence of a qualified ERISA-plan. The Trial Court, only, concluded that Petitioner (then Plaintiff) has a claim against ERISA-plan benefit, allegedly, denied.

Original jurisdiction does "not" mean "exclusive" jurisdiction. No Respondents, ever, put anything in the record, of any court below, to question the competency of the State Court of Origin as a cause for case-removal. Nor, did Trial Court found/analyzed that state-case's relieves sought were against an ERISA-plan.

Enforcement of claim for denied benefit (or explanation of future benefit), i.e., § 502(a)(1)(B), squarely falls within § 502(e)(1) and a state court-of-competent has jurisdiction (more so, when the Trial Court has-had "no" original (be it exclusive or concurrent) subject-matter jurisdiction over a substantial state-cause, e.g., FEHA.

At removal-date, facially, only ERISA "conflict-preemption" was available to a defendant as an affirmative-defense, in state-court, so as not to pay multiple payment-of-benefits for the same injury-in-fact, i.e., from its ERISA Plan and some non-ERISA Plan, e.g., California Workers' Compensation. It is

well settled that ERISA "conflict-preemption," alone, is not jurisdictional (*see infra*).

Neither SMI's answer-pleading filed in State Court of Origin, nor, the notice-of-removal (*see* Apps.: "L," & "M") provide any ground for ERISA "complete-preemption." As the Remand Hearing record shows (notwithstanding lack of a well pleaded complaint), the Trial Court only concluded that Petitioner (then Plaintiff) had an ERISA benefit claim. ERISA "conflict-preemption," alone is not sufficient to bring about a state-case removal, from which then, supplemental jurisdiction is conferred over state-causes. It is ERISA "complete-preemption" which is jurisdictional to bring about a case removal and to provide supplemental jurisdiction. *See* Metropolitan Life Ins. Co. v. Taylor, 481 US 58, 63 (1987). When a state-complaint is not well pleaded, only if ERISA "complete-preemption" is shown (by evidence and not just mere averment), then state-cause(s) against ERISA-plan[14] is converted into federal-cause and enforcement would be under ERISA civil-enforcement, i.e., § 502, et seq., and preemption under § 514, et seq.; therefore, state-case made removable to a US district court.

It is a well settled holding of the instant Court (even before the modern amendments to 28 USC *in re* removal) that federal statute should not be construed beyond limits intended for that federal statute set by the Congress so as to unduly expand the subject-matter jurisdiction of a federal court. *See* Pullman

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[14] Be it for ERISA-plan administration, ERISA-plan benefit dispensing, ERISA-plan benefit calculation, extra ERISA-plan liability, etc.

Co. v. Jenkins, 305 US 534, 548 (1939). The same still holds in the instant Court to prevent *ad hoc* state-case removal on a defective theory of ERISA-preemption. Paraphrasing from Justice Scalia, concurring with the unanimous Court's view (Court's opinion delivered by Justice Thomas), everything is "related" to everything; that can not be the Congress' intent in enacting ERISA. *See* California Division of Labor Standard Enforcement v. Dillingham Construction, N.A., Inc., 519 US 316 (1997).

B. Standing under ERISA and federal justiciability doctrine

It is a well settled holding of the instant Court that there is a distinction between claim, i.e., cause-of-action, and case/controversy. ERISA defines a "participant" or "beneficiary" within the meaning of the Act. *See* 29 USC 1002(7) & (8); a.k.a., § 3(7) & (8) of ERISA code.

The "standing" to bring a suit by a party in status[15] of Petitioner, under Title I of ERISA § 502(a), requires a party, on date of action-filing, to be a participant, a future-eligible plan-participant, had

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[15] While acting within the statute of limitation; at one-point an eligible active employee at an employer which had a qualified ERISA benefit-plan, i.e., plan participant standing, and ERSIA plan beneficiary standing. Then, an ineligible employee to be a plan-participant for having been laid-off (or otherwise terminated) "and" the plan-expressed benefit coverage-duration had elapsed. It is clear that SMI has not recalled Petitioner back to work, or else, there would not be a wrongful employment termination civil-suit to be had (starting in September of "2005" on-ward).

been a past-plan-beneficiary and be seeking denied past-benefit, and/or have a "reasonable" likelihood to be a future ERISA-plan participant/beneficiary (by being re-employed as oppose to be a new-employee).

On the date state-case was filed, Petitioner had no "standing" to bring suit under § 502(a) as a "plan-participant." *See* 29 USC 1140; a.k.a., § 510 of ERISA code, which defines a plan "participant;" also, *see* Firestone Tire and Rubber Co. v. Bruch, 489 US 101 (1989) (for the US Supreme Court's "... view on the term 'participant'..."). For the Petitioner had been terminated from employment at SMI, and, Petitioner had no "reasonable" likelihood of being re-called/re-hired by/at SMI.

On the date Petitioner filed his first state-case,[16] the only "standing," under ERISA, Petitioner had; was to bring suit under § 502(a) for recovery of any past benefit-denied, or, obtaining any plan-document(s).[17]

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[16] Petitioner on "September" "13," "2005" (state-court filing date) was "not" a plan "participant" as described by 29 USC 1140 (§ 510) and Firestone Tire and Rubber Co. v. Bruch for Petitioner was "not" employed at SMI, and, the 2-year plan coverage had expired. Nor, did SMI has-had a "reasonable" expectation of re-employing Petitioner; as SMI has in fact "not" re-hired Petitioner (or there would not be a wrongful employment termination civil-suit to be had).

[17] Just two court-days before the remand-hearing calendared for January "24," "2006," SMI put its ERISA Operative Plan Document before the Trial Court. *See* C05; Docket ID(44). By that date Petitioner was already in transit to the venue of USDC in San Francisco and did not receive the Plan Document until after remand-hearing. None-the-less, the records below "is-what-it-is." Petitioner put the entire SMI employee's benefit handbook, which includes a summary of ERISA benefits in the

The Ninth Circuit has some-what differing views on how one's "participant" standing "ends." However, the Ninth Circuit is consistent in that on case filing-date one needs to have an ERISA-standing, e.g., as "participant" or "beneficiary" or "colorable claim," to maintain his/her suit, i.e., to survive a Fed. R. Civ. P. 12(b)(6). *See*: Parker v. Bain, 68 F.3d 1131, 9th Cir. (1995) (the "Parker" plaintiff had participant-standing at filing time; that plaintiff's participant status ended during trial, hence, that plaintiff lost standing); *cf.*, Crotty v. Cook, 121 F.3d 541, 9th Cir. (1997) (the "Crotty" plaintiff had standing at the suit filing date, however, plaintiff did not lose standing during trial when plaintiff received benefit owed); and, Schultz v. PLM International, Inc., 127 F.3d 1139, 9th Cir. (1997) (same as Crotty v. Cook).

Therefore, when Petitioner's said voluntarily, with prejudice, dismissal motion was granted, the Petitioner lost his only plausible standing to bring a civil-action cognizable in law against SMI's ERISA-plan, in any court (federal or state).

When Defendants filed their non-opposition notice against the said voluntarily dismissal motion, then Defendants lost their adversarial-stand on the matter of ERISA. Since SMI, the operative ERISA-plan owner, did not and has not re-hired Petitioner before the elapse of operative ERISA-plan's benefit

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record of C05. That handbook shows 2-year disability benefit for qualified employee; starts off as a "none" ERISA benefit, then starting on the 91st day, ERISA-plan takes over. *See* C05; Docket ID(178).

duration; then, SMI (as the only Defendant who has-had ERISA-standing) lost ERISA standing, too; to assert "complete-preemption" to bring about a case-removal.[18]

Having lost ERISA-standing and no adversarial stand, then the ERISA claim became moot before the Trial Court as there was nothing for the Trial Court to "adjudicate" *in re* ERISA claim. Hence, the Trial Court lost jurisdiction to keep Petitioner in-court on premise of ERISA claim. *See* Allen v. Wright, 468 US 737 (1984) (discusses an Article III standing and related doctrines such as ripeness, mootness, and injury-in-fact); and, Steel Co. v. Citizens for a Better Environment, 523 US 83, 102-104 (1998); also, *see*, e.g., S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461, 9th Cir. (2001) (plaintiff lacked standing as no injury-in-fact was attributed to defendant).

Pursuant to the above, the Petitioner has-had no standing for claim against SMI's ERISA-plan commencing on the day after the said voluntarily dismissal of any claim in ambit of ERISA was entered into the docket-report of C05 which was "April" "26," "2006" (*see* C05; Docket ID(101)). Therefore, the entire removal of state-case, on "May"

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[18] To the extend that SMI may had paid any benefit, it may have-had "conflict-preemption" to ensure, while any other cause may had been viable, that SMI is not paying double benefit; however, "conflict-preemption" is not jurisdictional. Although, Petitioner's complaint-pleading stated "obstruction" of filing for California Workers' Compensation, and not necessarily denial of Workers' Compensation, none-the-less, workmen's compensation causes are prohibited to be heard in a federal court and are non-removal. *See* 28 USC 1445(c).

"17," "2006," on premise of ERISA "complete-preemption" was in error, and, C06 should be remanded for want of removal-jurisdiction.

For purposes of brevity, the Petitioner only mentions the following in passing:

- *see* Harris v. Provident Life and Accident Ins. Co., 26 F.3d 930, 9th Cir. (1994) (US district court lacked jurisdiction over state-law claims because the former-employee/plaintiff lacked ERISA-standing to bring ERISA-suit),
- *see* Infantino v. Transamerica Ins. Group, 66 F.3d 335, 9th Cir. (1995) (state-law claims not preempted when plaintiff had no ERISA-standing to bring ERISA-suit),
- *see* McLeod v. Oregon Lithoprint, Inc., 46 F.3d 956, 9th Cir. (1995) (explains reasonable expectation to be in a "covered-employment") [cert. granted, judgment vacated on other grounds than expectation to be in a covered-employment; 517 US 1116 (1996)], and
- *see* Kuntz v. Reese, 785 F.2d 1410, 9th Cir. (1986) (per curiam) (plaintiff who had received benefit and was "not" likely to receive benefits in the "future" had no standing to bring ERISA-suit); also, Crotty v. Cook at (545) [citing from Kuntz v. Reese].

When considering Firestone Tire and Rubber Co. v. Bruch and its stated, disjunctive, two-prong test and McLeod v. Oregon Lithoprint, Inc. for reasonable expectation of being in a covered-employment, it is clear that the Petitioner has-had no standing under ERISA to have brought a "colorable claim" on the

filing date of the state-case which was removed to become C05 (or that of C06).

Therefore, when considering the totality of *supra* for loss/lack of Petitioner's standing under ERISA (for denied benefit, future benefit, reasonable-expectation of covered-employment, and colorable claim), and, SMI, as the only Defendant with ERISA-standing for being ERISA-plan owner and administrator, losing its standing; then the Ninth Circuit analysis fails when it considered common-law claim of negligence as the proper removal and maintenance of Trial Court's subject-matter jurisdiction. *See* App.: "D," *infra*. Also, in FAC, Petitioner did not allege negligence to ERISA benefit denied, but to medical record keeping, against Respondent (then Defendant) Matrix Absence Management, Inc. and the two-individual Respondents (then Defendants) for not following SMI's human-resource written policies. Neither of whom were an ERISA entity to trigger conflict/complete preemption.

C. Other pleaded federal statutes did not confer jurisdiction

It is well settled in the instant Court that mere appearance of a federal statute on one's complaint-pleading does not make the matter a federal case/controversy, or, a complaint-pleading removal to a federal court.

Neither WARN Act nor HIPAA conferred subject-matter jurisdiction. As the Remand Hearing Transcript (*see* § VIII.2.A., *supra*; and App.: "O," *infra*) shows, the claim of WARN Act was not

amended into FAC as a new claim, it was in the not well pleaded state-complaint, too. The letter of WARN Act (*see* § VII.D., *supra*) states that WARN Act is a "non-preemptive" federal act. The only published ruling on-point within the 9th Cir. Petitioner could find is Smith v. Genstar Capital LLC., 2001 WL 1658315, N.D.Cal. (2001) (not reported in F.Supp.2d). Smith v. Genstar Capital LLC. supports the non-preemptive nature of WARN Act ("Smith" was removed from state-court on assertion of WARN Act preempting, "Smith" court found no such a thing, remanded and granted costs against defendant). FEHA claim makes no reference nor does it rely upon existence or adjudication of WARN Act claim in state-case removed, or, in FAC.

Petitioner in his opposition to dismissal (*see* C05; Docket ID(124); filed on May 31, 2006) noted that HIPAA has no private right-of-action, and, that Petitioner was alleging a non-statutory common-law for Defendant Matrix Absence Management, Inc. had, allegedly, failed to properly maintain medical record. When a federal statute has no private right-of-action, such a statute does not confer subject-matter jurisdiction to a US district court.

The Ninth Circuit in its opinion of August 27, 2007 (which Petitioner, then Appellant, timely, noted to the Ninth Circuit Panel via filing of a supplemental citation on-point); expressly named HIPAA as a statute which does not confer subject-matter jurisdiction to a US district court for it has no private right-of-action. Therefore, the Ninth Circuit concluded a California common-law claim against HIPAA could not provide a removal-jurisdiction. *See*

Webb v. Smart Document Solutions, LLC., 499 F.3d 1078, 9th Cir. (2007).

When considering, 28 USC 1447(c), HIPAA (not providing an original or removal subject matter jurisdiction), WARN Act (being non-preemptive federal statute), WARN Act not having been amended anew into FAC; and state-claims in FAC, e.g., FEHA, were separable from other causes of action (i.e., neither HIPPA nor WARN Act provides an Article III controversy with remaining case-n-chief sate-cause, or, survival of case-n-chief rested on existence of HIPAA or WARN Act claim in FAC, or, survival of case-n-chief required Trial Court's judicial ruling on merits of claim against HIPAA or WARN Act claim(s)); then, respectfully said, Petitioner believes that the Trial Court erred for not remanding for want of subject-matter jurisdiction.

D. Not all defendants were an ERISA entity

The Respondents have put nothing in the records below to show (or even to aver) that "all" Respondents (then Defendants) were a qualified ERISA entity, e.g., ERISA plan-owner, ERISA plan-administrator, ERISA multi-employer plan-owner, etc.) so that "any" claim against "any" Respondent could, facially, encroach into ERISA's protected domain. The ERISA Operative Plan Document SMI put in record of C05, only shows SMI as the sole plan-owner and administrator.

The SMI's ERISA-plan (as stated in the Operative Plan Document and employee handbook) only provides employee benefit, i.e., it is not an ERISA

pension plan (nor has the Petitioner brought any claim for denied pension).

IX. Reasons for Granting the Petition

1. Summary

For the following, Petitioner, respectfully, seeks the instant Court to grant his Petition so that the following would be discussed in more detail in a merit-brief:

1. contrary rulings below to the holdings of instant Court on the same issue of law (as discussed *supra*),
2. contrary rulings below to that of Ninth Circuit's own holdings on the same issue of law (as discussed *supra*),
3. contrary rulings below to other Circuits on same or similar issue of law (*see* § IX.2, *infra*), and
3. upholding sovereignty of California State to have its own courts decide its own statutes in respect and regards for US' federal form of government.

2. Merits of FEHA claim[19]

As all of *supra* shows, the holdings of the instant Court and that of the Ninth Circuit are diametrically contrary to the rulings below on matter of ERISA's

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[19] For an extensive opinion on FEHA (including discussion on interactive discussion, mental health disability, adverse harm due to perception of disability, etc.) *see* Gelfo v. Lockheed Martin Corp., 43 Cal.Rptr.3d 874, 882-885, Cal.App. 2nd Dist. (2006).

preemption and standing. The rulings below are contrary to other Circuits, on same or similar points, too. For brevity, Petitioner mentions some in passing and hopes to expand upon them in merit-brief, for example:

- *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 5th Cir. (Tex.) (1999),
- *Hobbs v. Blue Cross Blue Shield of Alabama*, 270 F.3d 1324, 11th Cir. (Ala.) (2001),
- *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 7th Cir. (Ill.) (1996),
- *Rozzell v. Security Services, Inc.*, 38 F.3d 819, 5th Cir. (Tex.) (1994),
- *Ward v. Alternative Health Delivery Systems, Inc.*, 261 F.3d 624, 6th Cir. (Kentucky) (2001),
- *Warner v. Ford Motor Co., 46 F.3d 531*, 6th Cir. (Mich.) (1995) (en banc).

The matter of ERISA preempting FEHA has been before the instant Court once before, though not squarely. The petitioner and respondent of that petition by stipulation dismissed (without prejudice) from the complaint the question of ERISA preempting FEHA (for FEHA's protection against discrimination due to pregnancy disability; a form of temporary disability from employment point-of-view). *See* Cal. Fed. Savings & Loan Assn. v. Guerra, 479 US 272 (1987); n.9.

The FEHA claim, in Petitioner's complaint-pleading in all courts below, has-had no dependency upon any ERISA-plan. When considering that the removed case was a non-diversity case, then the US district court is to interpret the substantive law of the case in

accordance with the forum state's highest court-of-competent (unless otherwise indicated by the instant Court, its own circuit's full-court, or statute change). Therefore, the analysis would be done under California's Primary Rights Theory.

Under the "Primary Rights Theory," within the California's jurisprudence, states that a "claim" for relief asserted upon a "cause of action" is based on the "harm" suffered and not the particular theory asserted. *See* Crowley v. Katleman, 34 Cal.Rptr.2d 386, Cal. (1994). The Primary Rights Theory provides that a "cause of action" is comprised of a "primary right" of a plaintiff, a corresponding "primary duty" of a defendant, and a "wrongful act" by a defendant constituting/resulting in a "breach of that duty."

As such, an employer's duty to properly dispense ERISA-plan benefit(s), is not the same duty such an employer has to engage in a timely, interactive, with good faith discussion with an employee within the meaning of FEHA. Nor, did the instant Petitioner theorized (when considering relieves the Petitioner sought from the state-court, in his original state-court complaint, or, the Trial Court in his FAC), that the harm brought upon him (to be gainfully employed at SMI to enjoy his full-salary) was a harm he suffered, allegedly, for wrongful denied ERISA-plan long-term disability benefit.

As the Ninth Circuit dispositive memorandum on the Petitioner's appeals noted (*see* App.: "D," pg(2)), the Petitioner has an evidentiary exhibit-set. Petitioner is able to meet his burden under McDonnell Douglas Corp. v. Green, 411 US 792 (1973). Among a growing

number of Circuits, the Sixth Circuit has a precedential ruling that age discrimination is not preempted by ERISA. *See* Warner v. Ford Motor Co., 46 F.3d 531, 6th Cir. (Mich.) (1995) (en banc).

A non-movant is obligated to defeat a "properly" presented opposing MSJ. When the opposing side presented nothing but hearsay (and going as far as filing declaration from persons whom were not disclosed pursuant to the Trial Court's discovery pre-trial order & FRCP; or, filing uncured deposition, etc.), then such a MSJ was not a properly presented and supported paper and should have been denied. Substantial of which are evident from the MSJ hearing-transcript which Petitioner put in the records of Ninth Circuit below, and Petitioner prays for a grant of instant Petition so that all that may be brought before the instant Court for its review.

The Trial Court's dispositive ruling on MSJ shows in verbatim the "same" miscitation as that of Respondents' MSJ paper. Respectfully said, Petitioner does not accept a cut-paste of MSJ paper and then re-titling it as an order by Trial Court as a properly supported and presented MSJ. For example, *see* App.: "J," pg(16). The Trial Court is citing a "<williams v. genetech, inc., 74 cal.app. 4th 215, 226 (1999)>." The "same" miscitation appears in Respondents' MSJ, "verbatim." Or, the Trial Court, at App.: "J," pg(9), n.3, states finding of fact pursuant to "evidence" of letters, e-mails to/from Petitioner and SMI's personnel, also, Petitioner executed instruments. Petitioner is unable to do so; for there never was such "supporting" evidence presented by

Respondents in support of their MSJ and their assertions, contentions, and averments.

Pursuant to FEHA, any "accommodation" shall be (if not must be) "after" there was a timely, interactive, and in good faith discussion between the employer and employee (or applicant). There must be an evidence of that, too. Mere averment does not make it so.

When there is no properly supported MSJ paper presented, then the non-movant is not obligated to defeat it, per se. A "ton" of after-fact pre-textual averment does not make it so; for, preponderance of evidence standard is not measured per-pound of weight. Or, simply putting a key-word in some electronic database and then 100s of case-laws (good, bad, overruled, on-point, irrelevant to the point, not from a court of competent, from a court of competent etc.) popping-up and then citing them in one's MSJ does not make it so, nor, puts the burden on non-movant to defeat "hearsay."

3. Matter of first impression for federal court

The instant Petitioner, respectfully, suggests another issue for the Court's consideration in granting the instant Petition:

> Whether a state common-law claim against Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191, 110 Stat. 1936 (codified as amended in various sections of Title 42, USC) confers subject-matter jurisdiction to a US district court over a non-diversity

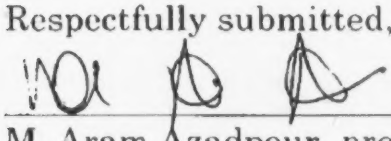
removed-case, so that a US district court may not be required to remand pursuant to 28 USC 1447(c) when subject-matter of removal has been voluntarily dismissed with-prejudice.

As Webb v. Smart Document Solutions, LLC., stated when a federal statute does not have a private right-of-action, a federal court has no subject-matter jurisdiction (in "Webb," US district court assumed jurisdiction pursuant to diversity-of-citizenship and not upon federal question). In Petitioner's complaint, below, state common-law of negligence against HIPAA for safe keeping of one's medical record was alleged against Respondent Matrix Absence Management, Inc. (a non-ERISA Defendant below).

X. Conclusion

Pursuant to the foregone, the instant Petitioner respectfully prays that his Petition for a Writ of Certiorari to the Ninth Circuit to be granted.

Respectfully submitted,



M. Aram Azadpour, *pro se* Petitioner
Date: January 27, 2009

XI. Appendices

A. Ninth Circuit Mandate

B. Ninth Circuit Order on Rehearing

C. Ninth Circuit Order on Filing Petition for Rehearing

D. Ninth Circuit Dispositive Memorandum

E. Notice of Appeal from C06-03272-MJJ

F. US District Court Judgment in C06-03272-MJJ

G. US District Court Dispositive Order C06-03272-MJJ

H. Notice of Appeal from C05-04087-MJJ

I. US District Court Judgment in C05-04087-MJJ

J. US District Court Dispositive Order in C05-04087-MJJ

K. Complaint Pleading in State Court

of Origin

L. Defendant Sun Microsystems, Inc.
Answer Pleading in State Court
of Origin

M. Defendants' Notice of State-Case
Removal

N. US District Court Orders
in C05-04087-MJJ

o upon voluntarily dismissal of disability
denied benefit claim

o upon question of jurisdiction

O. Hearing Transcript in C05-04087-MJJ,
Remand Hearing

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Appendix A

Ninth Circuit Mandate

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UNITED STATES COURT
OF APPEALS
FOR THE NINTH CIRCUIT

[file date: October 23, 2008]
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Mostafa Aram Azadpour
Plaintiff-Appellant,
v.
Sun Microsystems, Inc.;
Matrix Absence Management, Inc.;
Babu Turumella;
Norman Yeung,
Defendants-Appellees.

No. 06-16960
D.C. No. CV-05-04087-MJJ
Northern District of California, San Francisco
MANDATE

Mostafa Aram Azadpour
Plaintiff-Appellant,
v.
Sun Microsystems, Inc.;
Matrix Absence Management, Inc.;
Babu Turumella;
Norman Yeung,
Defendants-Appellees.

No. 07-16556

D.C. No. CV-06-03272-MJJ
Northern District of California, San Francisco
MANDATE

The judgment of this Court, entered 07/11/2008, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

_____s/s/
Molly C. Dwyer
Clerk of Court
By: Theresa Benitez
Deputy Clerk

Appendix B

Ninth Circuit Order on Rehearing

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UNITED STATES COURT
OF APPEALS
FOR THE NINTH CIRCUIT

[file date: October 15, 2008]
[original formatting altered to fit; not a true-copy]

Azadpour	Nos. 06-16960
v.	07-16556
Sun Microsystems, Inc., et al.	D.C. No. CV-05-04087-MJJ
	D.C. No. CV-06-03272-MJJ

ORDER

Before: WALLACE, HAWKINS, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en bane and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

The motion to stay issuance of the mandate filed on September 23, 2008 is denied.

No further filings will be accepted in this closed case.

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Appendix C

Ninth Circuit Order on Filing Petition for Rehearing

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UNITED STATES COURT
OF APPEALS
FOR THE NINTH CIRCUIT

[file date: September 19, 2008]
[original formatting altered to fit; not a true-copy]

Azadpour	Nos. 06-16960
v.	07-16556
Sun Microsystems, Inc., et al.	D.C. No. CV-05-04087-MJJ
	D.C. No. CV-06-03272-MJJ

ORDER

Before: WALLACE, HAWKINS, and THOMAS, Circuit Judges.

Azadpour's motion to file an oversized petition for panel rehearing and petition for rehearing en banc is granted. The Clerk is directed to file and circulate the petitions received on August 15, 2008.

Azadpour's motion for leave to file a motion in the district court under Rule 60 of the Federal Rules of Civil Procedure, filed in appeal No. 07-16556, is denied.

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Appendix D

Ninth Circuit Dispositive Memorandum

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NOT FOR PUBLICATION

UNITED STATES COURT
OF APPEALS
FOR THE NINTH CIRCUIT

[file date: July 11, 2008]
[original formatting altered to fit]

Azadpour	Nos. 06-16960
v.	07-16556
Sun Microsystems, Inc., et al.	D.C. No. CV-05-04087-MJJ
	D.C. No. CV-06-03272-MJJ

MEMORANDUM[1]

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Submitted July 1, 2008[2]

Before: WALLACE, HAWKINS, and THOMAS, Circuit Judges.

In these consolidated appeals, Mostafa Aram Azadpour appeals pro se from the district court's summary judgment in favor of defendants and final

[1] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

judgment dismissing Azadpour's actions alleging that he was wrongfully denied long-term disability benefits. We have jurisdiction under 28 U.S.C. § 1291. After de novo review, *Universal Health Servs. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004) (grant of summary judgment); *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (dismissal based on res judicata); *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005) (dismissal for failure to state a claim); *Sparta Surgical Corp. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1211 (9th Cir. 1998) (denial of remand), we affirm.

In appeal No. 06-16960, we affirm for the reasons stated in the district court's order granting summary judgment in favor of defendants, entered on September 26, 2006. Azadpour advances no argument challenging the district court's conclusions of law, and we therefore deem any such arguments abandoned.. See Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir. 2003) (explaining that issues not argued on appeal are deemed abandoned). Contrary to his contention, Azadpour may not present for the first time on appeal purportedly new facts in opposition to summary judgment, See Ramirez v. Galaza, 334 F.3d 850, 859 n.6 (9th Cir. 2003) ("We have consistently held that a party may not raise new issues of fact on appeal after declining to present those facts before the trial court.").

In appeal No. 07-16556, we affirm the district court's dismissal based on the doctrine of res judicata. *See Tripati v. G.L. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988) (per curiam) ("The established rule in federal courts is that a final judgment retains all of its res judicata consequences pending decision

of the appeal.") (citation and internal quotation marks omitted). The district court also properly dismissed Azadpour's fraud claim, the only claim in the second action not subject to res judicata, for failure to state a claim. *See* Fed. R. Civ. P. 9(b) (requiring fraud to be pled with particularity); *see also* Cal. Civ. Code § 1573 (establishing elements of constructive fraud under California law).

In both actions, the district court properly denied Azadpour's motions to remand because the Employee Retirement Income Security Act ("ERISA") preempts his claims. *See* 29 U.S.C. § 1144(a) (ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"); *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 412 (9th Cir. 1994) ("The Ninth Circuit has held that ERISA preempts common law theories of breach of contract implied in fact, promissory estoppel, estoppel by conduct, fraud and deceit, and breach of contract.").

Azadpour's motion for leave to file a motion under Rule 60 of the Federal Rules of Civil Procedure in the district court is denied.

Azadpour's motion to file an oversized reply brief in appeal No. 07-16556 is granted.

AFFIRMED.

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Appendix E

Notice of Appeal from C06-03272-MJJ

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IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[file date: August 23, 2007]
[original formatting altered to fit; not a true-copy]

Azadpour	No. C06-03272-MJJ
v.	
Sun Microsystems, Inc., et al.	Notice of Appeal

PLEASE TAKE NOTICE that:

A. The Plaintiff, pro se, is filing this Notice of Appeal, here and now, to appeal from:
   i. the Judgment entered on July 30, 2007 in the instant Case (Doc. #258),
   ii. all preliminary/interlocutory Orders entered in the instant Case "granting" Defendants' motions for dismissal of Complaint and/or Amended Complaint,
   iii. all preliminary/interlocutory Orders entered in the instant Case "denying" Plaintiff's motions for remand and/or leave, and
   iv. the post-judgment Order "denying" Plaintiff's motions (Doc. #266).

B. The appeal is to be taken at the US Court of Appeals for the Ninth Circuit in San Francisco.

C. You are being served the instant Notice pursuant to the Rule 3(a)(1) of the Federal Rules of Appellate Procedure ("FRAP"), i.e., FRAP.3(a)(1).

D. Barring any tolling, pursuant to FRAP.4(a)(1)(A), a party has 30-days from the date a judgment is entered to file a notice of appeal.

E. Enclosed please find a check for the applicable appeal-filing-fee of $455.00 (as stated on the CAND's website; current as of July 06, 2006).

F. Attached (1 page) is a true-and-accurate copy of an e-mail, dated August 20th, sent to Attorneys representing all Defendants, announcing Plaintiff's intent to appeal the instant Case.

G. Attached (10 pages) is the original of Plaintiff's Civil Appeals Docketing Statement for the Ninth Circuit.

H. Plaintiff has served a true-and-accurate copy of the instant Notice, and all its attachments, upon the Chief Attorney of Record for all Defendants.

I. For your convenience, along this "original" 3-copies of the instant Notice are provided.

J. Plaintiff has, already, ordered (and paid for) the transcript-record of all hearings held in the instant Case.

Dated: August 22, 2007

_____s/s

M. Aram Azadpour,
pro se Plaintiff

Appendix F

US District Court Judgment in C06-03272-MJJ

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IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[file date: July 30, 2007]
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Azadpour	No. C06-03272-"SI"
v.	
Sun Microsystems, Inc., et al.	[proposed] Judgment

Pursuant to the Court's Order dated July 23, 2007, granting Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint ("SAC") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, without leave to amend, the Court hereby Orders as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's entire action is dismissed and that JUDGMENT IS ENTERED IN FAVOR OF DEFENDANTS.

Dated: 7/28/2007

_____s/s
HONORABLE MARTIN J. JENKINS

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Appendix G

US District Court Dispositive Order in C06-03272-MJJ:

i) *order granting defendants' motion to dismiss*
ii) *order granting defendants' motion to dismiss second amended complaint*

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IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[file date: April 02, 2007]
[original formatting altered to fit; not a true-copy]

Azadpour	No. C06-03272-MJJ
v.	
Sun Microsystems, Inc.,	
et al.	

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Before the Court are Defendants Sun Microsystems, Inc. ("Sun"), Matrix Absence Management, Inc. ("Matrix"), Babu Turumella ("Turumella"), and Norman Yeung's ("Yeung") (collectively, "Defendants") Motion to Dismiss.[1] Defendants argue that this action is not the first time that Plaintiff has raised these claims against them. Defendants contend that prior to filing the instant action, Plaintiff had asserted the same and transitionally similar claims against them in another action, *Azadpour v. Sun Microsystems, Inc., et al.*, Case No. CO5-4087 MJJ (the "First Action"). Defendants now move to dismiss on grounds that Plaintiff's claims in the current action are barred by the doctrines of res judicata and collateral estoppel. *Pro se* Plaintiff Mostafa Aram Azadpour ("Azadpour")

[1] Docket No. 39.

opposes the motion. For the following reasons, the Court **GRANTS** Defendants' Motion to Dismiss.

BACKGROUND

I. Procedural History

A. Procedural History of the First Action

Plaintiff filed the First Action in state court in September 2005. Defendants timely removed the First Action to this Court on October 11, 2005. On January 24, 2006, this Court denied Plaintiff's motion to remand the First Action on the ground that federal question jurisdiction existed because Plaintiff's claims implicated an allegation for denial of long-term benefits under Sun's Comprehensive Welfare Plan (the "Plan"), which is an employee welfare plan within the meaning of ERISA.[2] On March 29, 2006, Plaintiff amended the Complaint, adding additional facts and allegations and moved again to remand the First Action to state court. This Court denied Plaintiff's motion to remand on the grounds that Plaintiff's amendments added federal statutory claims, thereby preserving federal question jurisdiction.[3]

Plaintiff's claims in the First Action were for: (1) breach of contract; (2) "Inequitable Treatment" in violation of the Workforce Investment Act of 1998 ("WIA"); (3) violation of the California Fair Employment and Housing Act ("FEHA"); (4) "conspiracy"; (5) "simple negligence"; (6) "gross negligence"; (7) violation of the Worker Adjustment

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[2] Docket No. 54, Case No. 05-4087 MJJ.

[3] Docket No. 130, Case No. 05-4087 MJJ.

and Retraining Notification Act ("WARN"); and (8) violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"). On September 26, 2006, this Court granted Defendants' motion for summary judgment in the First Action.[4]

B. Procedural History of the Current Action

Plaintiff filed the current action in state court on April 17, 2006. On May 17, 2006, Defendants timely removed the current action on the grounds of diversity of citizenship and federal question jurisdiction.[5] On October 2, 2006, Plaintiff filed a First Amended Complaint ("FAC"). In the FAC Plaintiff alleges claims for: (1) violation of FEHA for discrimination and disability; (2) defamation; (3) violation of the California WARN Act; (4) breach of contract; (5) "failure to act in a manner in accordance with fiduciary, prudent, and/or reasonable responsibility towards the wellbeing [sic] of the Plaintiff and acting in good faith at all times," (6) fraud; (7) wrongful termination; (8) "reckless indifference for the wellbeing [sic] of the Plaintiff to the point of being 'negligence' in nature." On November 28, 2006, the Court denied Plaintiffs motion to remand the current action on the ground that federal question jurisdiction existed because Plaintiff's claims implicated an allegation for denial of long-term benefits under the Plan, which is an employee welfare plan within the meaning of ERISA.

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[4] Docket No. 218, Case No. 05-4087.

[5] In their Opposition to Plaintiff's Motion to Remand, Defendants contend that they do not now assert diversity as a basis for jurisdiction.

II. Factual Background

A. Factual Background of the First Action

In the First Action, Plaintiff alleged that Sun hired Plaintiff in May 2002 to work on the Millennium Project ("the project"). (FAC, First Action, III.) Plaintiff claimed that his manager, 0 Babu Turumella ("Turumella") and his project manager, Norman Yeung ("Yeung") treated him unfairly. (Id. at II 2-6.) Plaintiff contended that Turumella hired a friend as the technical lead on the project and that Turumella's friend was not competent. (Id. at ¶ ¶ 4-5.) According to Plaintiff, Plaintiff's complaints about Turumella's hiring practice and other complaints about the project went ignored by Defendants. (Id. at ¶ 5.) In particular, Plaintiff claimed that Defendants unreasonably pressured him into meeting an unreasonable project-schedule and imposed an excessive workload, which caused him to transfer from a "management ladder" position to an "individual contributor" or face being laid off. (Id.) In the original complaint filed in the First Action, Plaintiff also alleged that Turumella made inappropriate sexual gestures towards him. (Complaint ("Compl."), First Action, ¶ 2.) Plaintiff alleged that after going out on leave Matrix stopped his disability payments. (FAC at ¶ 7.) Plaintiff complained that he attempted to bring his concerns about management and about returning to work to Human Resources in October 2003 but that Defendants failed to respond. (Id. at ¶ ¶ 8-9.) Plaintiff alleged that in January 2004 Matrix again stopped his disability benefits, misinformed him about his ability to appeal the benefits termination, and then in march/April 2004

improperly denied his workers' compensation claim. (Id. at ¶ ¶ 11-12.) Plaintiff claimed that while on leave Defendants informed him that the project on which he had been working had been cancelled. (Id. at 10.) Plaintiff contended he was not provided an accommodation to look for another job. (Id. at 10.) Plaintiff also contended that he suffered mental health injuries as a result of Defendants' treatment. (Id. at 6.)

B. Factual Background of the Current Action

Currently, Plaintiff alleges that Sun hired Plaintiff in May 2002 to work on the project and that Turumella hired a friend as a technical manager who Plaintiff deemed incompetent. (FAC, Current Action, at 1, 6.) Plaintiff reasserts that his complaints about these issues went unheard, that he was "forced" to change position from the management ladder to an individual contributor's role, under threat of being laid off and that this alleged treatment caused Plaintiff mental health injuries. (Id. at 7-8, 13, 16.) Plaintiff realleges that Turumella made inappropriate physical gestures. (Id. at 15.) Plaintiff again contends that after going out on leave Matrix stopped his disability payments. (Id. at ¶ 17.) Plaintiff again claims that he tried to bring his concerns about returning to work to human resources and that Defendants did not adequately respond. (Id. at ¶1118, 21.) Consistent with the First Action, Plaintiff claims that in January 2004 Matrix stopped his disability benefits and misinformed him about his ability to appeal the benefits termination and then in March/April 2004 improperly denied his workers' compensation claim. (FAC ¶ 25-26.) Also consistent,

is Plaintiffs allegation that while on leave he was informed that the project on which he had been working had been cancelled but that he was not provided an accommodation to look for another job. (Id. at 1123.)

According to Defendants, Plaintiffs current allegations arise from the same transactional nucleus of facts as do his allegations in the First Action and that the current claims either were, or could have been raised in the First Action and are therefore barred as a matter of law.[6]

LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim. Navarro v. Block, 250 F.3d 729,732 (9th Cir. 2001). Because the focus of a 12(b)(6) motion is on the legal sufficiency, rather than the substantive merits of a claim, the Court ordinarily limits its review to the face of the complaint. See Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). Generally, dismissal is proper only when the plaintiff has failed

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[6] Defendants request this Court to take judicial notice of: (1) Plaintiffs Complaint in Case No. CO5-4087, filed September 12, 2005; (2) Plaintiff's First Amended Complaint in Case No. CO5-4087, filed March 29, 2006; (3) Plaintiffs Complaint in Case No. 06-3272, filed April 12, 2006; and (4) Order Granting Defendants' Motion for Summary Judgment in Case No. CO5-4087, filed September 26, 2006. Under Fed. R. Evid. 201, a court may take judicial notice of "matters of public record." Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001). Judicially noticed facts "often consist of... prior court proceedings .. ." Del Puerto Water District v. U.S. Bureau of Reclamation, 271 F. Supp. 2d 1224, 1232 (E.D. Cal. 2003). The Court accordingly takes judicial notice of these documents.

to assert a cognizable legal theory or failed to allege sufficient facts under a cognizable legal theory. See SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 782 (9th Cir. 1996); Balisteri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). Further, dismissal is appropriate only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of a claim. See Abramson v. Brownstein, 897 F.2d 389, 391 (9th Cir. 1990). In considering a 12(b)(6) motion, the Court accepts the plaintiff's material allegations in the complaint as true and construes them in the light most favorable to the plaintiff. See Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000).

ANALYSIS

Defendants argue that this case cannot be maintained because it is barred on grounds of res judicata and collateral estoppel. In response, Plaintiff argues that it would inappropriate for the Court to consider his allegations in the First Action because a court may not consider matters outside the pleadings in ruling on a motion to dismiss. For the reasons stated below, the Court finds Plaintiff's argument unconvincing.

A challenge based on res judicata grounds may be properly raised in a motion to dismiss pursuant to Rule 12(b)(6). Thompson v. County of Franklin, 15 F.3d 245, 253 (2d. Cir. 1994); Scott v. Kuhlmann, 746 F.2d 1377, 1378 (9th Cir. 1984). Under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privities based on the same cause of action. See Brown v. Felsen, 442

U.S. 127 (1979). A person may be precluded from pursuing a claim if a prior party so closely represented his legal interests as to be his virtual representative. See Nordhorn v. Ladish Co., Inc., 9 F.3d 1402 (9th Cir. 1993); Bechtel Petro., Inc. v. Webster, 636 F. Supp. 486, 498 (N.D. Cal. 1984). Specifically, a federal action may be barred by the doctrine of res judicata where an earlier lawsuit: (1) involved the same claim as the present suit; (2) reached a final judgment on the merits[7]; and (3) involved the same parties or their privies. See Blonder-Tongue Laboratories v. Univ. Of Ill. Found., 402 U.S. 313, 323-324 (1971). "[R]es judicata bars not only all claims that were actually litigated, but also all claims that 'could have been asserted' in the prior action." Intl Union of Operating Engineers-Employers Constr. Indus. Pension, Welfare and Training Trust Funds v. Karr, 994 F.2d 1426, 1430 (9th Cir. 1993) (citing McClain v. Apodaca, 793 F.2d 1031, 1033 (9th Cir. 1986)). Likewise, "[r] es judicata bars all grounds for recovery that could have been asserted, whether they were or not, in a prior suit between the same parties on the same cause of action." Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320 (9th Cir. 1992). "One major function of claim preclusion is to force a plaintiff to explore all the facts, develop all the theories, and demand all the remedies in the first suit." 18 Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure, § 4408 (2006).

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[7] Summary judgment is a final judgment on the merits for purposes of preclusion. See Kourtis v. Cameron, 419 F.3d 989, 996 n. 4 (9th Cir. 2005); Jackson v. Hayakawa, 605 F.2d 1121, 1125 n. 3 (9th Cir. 1979).

The Ninth Circuit considers four factors in determining whether successive claims constitute the same cause of action: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; (4) whether the two suits arise out of the same transactional nucleus of facts. Intl Union of Operating Engineers-Employers, 994 F.2d at 1429 (citing Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir. 1982)). These factors, however, are "tools of analysis, not requirements." Id. at 1430 (citing Derish v. San Mateo-Burlingame Bd. of Realtors, 724 F.2d 1347, 1349 (9th Cir. 1983)). For example, the Ninth Circuit has previously applied the doctrine of res judicata solely on the ground that the two claims arose out of the same transaction, without reaching the other factors. See id. at 1430 (citing C.D. Anderson & Co. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987)). Determining whether two events are part of the same transaction is essentially dependent on whether the events are related to the same set of facts and whether the events could conveniently be tried together. See id. at 1429 (citing Western Sys., Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992)).

Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. Parklane Hosiery Co. v. Shore, 439 U.S.

322, 326 (citing Blonder-Tongue Laboratories, Inc., 402 U.S. at 328-329). "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." Dodd v. Hood River County, 59 F.3d 852, 863 (9th Cir. 1995). The rationale underlying the doctrine is that a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided a second time. In re Freeman, 30 F.3d 1459, 1465 (Fed. Cir. 1994).

The Court now turns to Plaintiff's current claims to determine whether they are barred either because the claims were previously litigated in the First Action or because the claims could have been litigated in the First Action.

I. Claims that Were Litigated in the First Action

A. FEHA Disability Discrimination

In the current action, Plaintiff's FEHA disability claim[8] is barred by the doctrine of res judicata because it was litigated in the First Action. Plaintiff's current claim is based on Sun's alleged failure to accommodate and to engage in the interactive process. (FAC, Current Action, ¶ 37(A).) In the First Action, Plaintiff similarly alleged that Sun had violated FEHA by failing to provide reasonable accommodation for his alleged disability of depression and by failing to engage in the interactive

[8] Plaintiff's FEHA disability discrimination claim is part of his first claim and is against Sun only.

process. As Defendants point out, the Court has already determined that Sun did provide reasonable accommodations to Plaintiff and did engage in the interactive process. (See Order Granting Defendants' Motion for Summary Judgment, Case No. CO5-4087 MJJ, at 10:24- 11:6.) Here, the Court finds that Plaintiffs current claims are sufficiently similar, that the Court has already reached a final judgment on the merits of these claims, and that the claims involve the same parties. As a result, the Court GRANTS Defendants' motion to dismiss as to Plaintiff's FEHA
disability claim.

B. Breach of Contract

Plaintiff's contract claim[9] is barred by the doctrine of res judicata because it was also litigated in the First Action. Plaintiff bases his contract on alleged violations of company policy including its purported practice of termination for cause. (FAC, Current Action, 37D.) Like the current action, in the First Action, Plaintiff alleged a breach of contract claim against Sun for Sun's alleged breach of company policy as set forth in Sun's Handbook. (FAC, First Action, 25A.) In granting Defendants' motion for summary judgment in the First Action, the Court found that Plaintiff had failed to offer any evidence of a contract between the parties or evidence to rebut the presumption that Plaintiff was an at-will employee. (Order Granting Defendants' Motion for Summary Judgment, Case No. CO5-4087 MJJ, at 7:12-20.) Plaintiff's current contract claim

[9] Plaintiff's fourth claim is for breach of contract and is against Sun only.

constitutes the same cause of action for res judicata purposes because it involves the substantially the same evidence, the same set of alleged rights, and arises out of the same transactional nucleus of facts. Plaintiff's current contract claim also involves the same parties, and as described above was decided on the merits. As a result, the Court GRANTS Defendants' motion to dismiss as to Plaintiff's contract claim.

C. Breach of Duty and Reckless Indifference

Plaintiff's current breach of duty and reckless indifference claims[10] were also litigated in the First Action. Plaintiff's current breach of duty claim alleges that all Defendants failed to act as fiduciaries, prudently and reasonably towards him. (FAC, Current Action, 37E.) Plaintiff's current "reckless indifference claim" against Sun and Matrix alleges that Sun and Matrix were indifferent to "the wellbeing of the Plaintiff to the point of being 'negligence' [sic] in nature." (FAC, Current Action, ¶ 37H.) Defendants contend that these claims are nothing more than an attempt by Plaintiff to "repackage" his negligence claims from the First Action. The Court agrees.

In the First Action, Plaintiff's negligence claims against Sun alleged that Sun failed to enforce its own policies, unreasonably delayed in processing Plaintiff's grievances, and failed to prevent harassment. (FAC, First Action, II 9, 26(5), and (6).) In the current action, Plaintiff's breach of duty

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[10] Plaintiff s fifth claim is for breach of duty and his seventh claim is for "reckless indifference."

claims are based on the same set of operative facts as those alleged in the First Action. Here, Plaintiff alleges that Sun failed to follow its own policies, unreasonably delayed in processing his grievances, and failed to address alleged harassment by Turumella. (FAC, Current Action. II 18, 21, and 22.) In granting Defendants' motion for summary judgment in the First Action, the Court found that this alleged conduct fell within the scope of Plaintiff's employment and was therefore preempted by the exclusive provisions of California's Workers' Compensation Act. (Order Granting Defendants' Motion for Summary Judgment, Case No. CO5-4087 MJJ, at 11:24-13:2.)

Similarly, in the First Action, Plaintiff alleged "gross negligence" against Matrix on the grounds that Matrix had not considered his interests, had not advised Sun of relevant laws, had not adhered to industry standards, had not informed Sun of his alleged medical restrictions, had stopped Plaintiff's disability benefits, had misinformed Plaintiff concerning the disability benefits appeals process, and unfairly denied Plaintiff's workers' compensation claims. (FAC, First Action, 11 7, 11, 12.) In the current action, Plaintiff's breach of duty claim against Matrix is similarly based on the allegation that Matrix misled him about the appeals process, mishandled information used in connection with Plaintiff's disability claim, and failed to advise Plaintiff of the procedure for seeking benefits under workers' compensation. (FAC, Current Action, Ili 17, 19, 20, 22, 25-26.)

In the First Action, Plaintiff also asserted negligence claims against Turumella and Yeung. As to Turumella, Plaintiff based his claim on Turumella's alleged management of the project and Turumella's alleged failure to facilitate and Turumella's alleged interference with Plaintiff's access to his "computing account." (FAC, First Action, In 28(3) and (4).) In the current action, Plaintiff's allegations against Turumella again focus on Turumella's management of the project and Turumella's alleged interference with Plaintiff's access to his computing account. (FAC, Current Action, ¶ 4-7, 10-11, 18.) As with Plaintiff's other claims, this Court already determined that Turumella's conduct was not actionable. (Order Granting Defendants' Motion for Summary Judgment, Case No. CO5-4087 MJJ, at 12:20-23, 26-13:2.)

As to Yeung, Plaintiff based his claim in the First Action, in part, on his alleged failure to ensure that WARN Act notice was given. (FAC, First Action, II 9, 29.) In the current action, Plaintiff's allegation against Yeung is also based on Yeung's alleged "failure to inform the Plaintiff of MM's closing in accordance with CALI-WARN Act of giving notice to the affected employees." (FAC, Current Action, ¶ 41.) Again, as with Plaintiff's other claims, this Court has previously determined that Yeung's alleged conduct was not actionable. (Order Granting Defendants' Motion for Summary Judgment, Case No. CO5-4087 MJJ, at 12:23-13:2.)

Since Plaintiff's current breach of duty[11] and reckless indifference claims are based on the same transactional nucleus of facts as alleged in the First Action, involve the same rights and evidence, the Court finds them to be the same claim as those raised in the First Action. Since those claims have already been already been litigated on the merits, involve the same parties, and could have been raised in the First Action, the Court **GRANTS** Defendants' motion to dismiss as to Plaintiff's breach of duty and reckless indifference claims as to all Defendants.

II. Claims that Could Have Been Litigated in the First Action

The Court now turns to Plaintiff's remaining claims in the current action: violation of FEHA for discrimination; violation of California WARN Act; fraud; defamation; and wrongful termination.

A. FEHA Age and National Origin

Plaintiff's current age and national origin discrimination claim[12] is against Sun for its alleged violation of FEHA. Plaintiff again bases his claim on the same transactional nucleus of facts that he alleged in the First Action. In the First Action, Plaintiff asserted national origin discrimination claims against Turumella and Yeung and offers no reason why he could not have asserted a similar claim against Sun. Additionally, while Plaintiff did not assert an age discrimination claim in the First

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[11] The Court also notes that Plaintiff has failed to allege the elements of his breach of duty claims and therefore has failed to allege a prima facie case against each of the Defendants.

[12] Plaintiff's national origin and age discrimination claim is part of his first claim.

Action, Plaintiff similarly offers no reason why he could not have asserted such a claim. An examination of the respective complaints from the two actions reveals that Plaintiff's claims are based on the same factual circumstances surrounding his employment. Accordingly, Plaintiff's age and disability discrimination claims under FEHA are barred. The Court GRANTS Defendants' motion to dismiss as to Plaintiff's age and disability discrimination claims under FEHA.

B. California WARN Act

Plaintiff's current California WARN Act claim against Sun[13] is based on the same transactional nucleus of facts as his federal WARN Act claim in the First Action. The only difference is that in the First Action, Plaintiff based his claim on federal law and now he asserts an identical claim under state law. Both statutes require 60 days notice, prior to a layoff, under certain circumstances. 29 U.S.C. § 2102(a); Cal. Lab. Code § 1400, et seq. After examining the respective claims in both actions, the Court finds that Plaintiff has offered no reason why he could not have asserted his current California WARN Act claim in the First Action. The Court also finds that Plaintiff has failed to sufficiently state a claim under the California WARN Act. Cal. Lab. Code § 1400 et seq. Accordingly, the Court GRANTS Defendants' motion to dismiss as to Plaintiff's California WARN Act claim.

C. Fraud

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[13] Plaintiff's third claim is for violation of the California WARN Act.

Plaintiff claims that Sun fraudulently reported certain amounts of Plaintiff's income to the state and federal income tax authorities. (FAC, Current Action, ¶1 37(F), 38.) However, Plaintiff has failed to plead the elements of fraud or plead with the requisite particularity required by the heightened pleading standard. See Cal. Civ. Code § 1709; Fed. R. Civ. Proc. 9(b).

In support of his First Amended Complaint, Plaintiff has submitted a declaration indicating that his current fraud claim is based on Sun's act of reporting certain checks that Sun sent to Plaintiff as a result of his termination to the Internal Revenue Service and California Franchise Tax Board. (Plaintiff's Declaration No. 2 in Support of His First Amended Complaint, ¶ 5.) Defendants encourage the Court to consider the content of Plaintiff's declaration as evidence of what Plaintiff would allege if he were allowed to amend his First Amended Complaint. Defendants contend that Plaintiff's declaration reveals that at the time of the First Action, Plaintiff had knowledge that Sun had treated the amounts at issue as taxable income, and therefore the claim is barred by the doctrine of res judicata.

However, in the context of a Rule 12(b)(6), a court cannot consider material outside the complaint (e.g., facts presented in briefs, affidavits or discovery materials). See Hon. William W. Schwarzer, et al., Federal Civil Procedure Before Trial, §§ 9:198, 9:211 (2006) (citing Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001); Beliveau v. Caras, 873 F. Supp. 1393, 1395 (C.D. Cal. 1995);

Paulsen v. CNF, Inc., 391 F. Supp. 2d 804, 807 (N.D. Cal. 2005)). Therefore, the Court will not consider the content of Plaintiff's declaration as means of defeating the current fraud claim. Accordingly, the Court **GRANTS** Defendants' motion to dismiss as to Plaintiff's fraud claim **WITHOUT PREJUDICE**. Plaintiff shall have **LEAVE TO AMEND** this claim within 30 days of the filing date of this Order.

D. Defamation

Regarding Plaintiff's current defamation claim[14] against Sun, Plaintiff again, fails to sufficiently allege the necessary elements to state a cause of action. See Shively v. Bozanich, 31 Cal. 4th 1230, 1242-43 (2003); Cal. Civ. Code §§ 45 and 46. Plaintiff also fails to provide any factual basis for his current defamation claim, only to state, "Defamation of the Plaintiff in conjunction with answering the DFEH." (FAC, Current Action, ¶ 37(B).) Plaintiff did not assert a defamation claim in the First Action, however Plaintiff did allege that he "filed a complaint with the California Department of Faire Employment and Housing ("DFEH"), the result of which is the attached Right¬to-Sue Notice." (FAC, First Action, ¶ 13.) Accordingly, the Court cannot determine as a matter of law that Plaintiff was able to assert this claim in the First Action and therefore **GRANTS** Defendants' motion to dismiss as to Plaintiff's fraud claim **WITHOUT PREJUDICE**. Plaintiff shall have **LEAVE TO AMEND** this claim within 30 days of the filing date of this Order.

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[14] Plaintiffs second claim is for defamation.

E. Wrongful Termination

Plaintiff's current wrongful termination claims[15] also fail because the claims could have been litigated in the First Action. Plaintiff's current wrongful termination claims allege "Wrongful termination (by malicious act of the [individual Defendants], against public policy, against implied contract, and against covenant of good faith and fair dealing.)" (FAC, Current Action, ¶ 37(G).) Defendants contend that the operative facts underlying Plaintiff's wrongful discharge claims are transactionally related to the operative facts that were litigated in the First Action and cannot be relitigated. A review of Plaintiff's FAC in the current action reveals that he alleges nearly identical facts. Plaintiff fails to offer a reason why he could not have asserted these claims in tl For these reasons, Plaintiff's wrongful termination claims fail. Plaintiff's wrongful termination claims fail for additional reasons. First, Plain sufficiently allege a cause of action for wrongful termination in violation of public po generally, Foley v. Interactive Data Corp., 47 Cal. 3d 654, 668-69 (1988). Second, P claims for wrongful termination "against implied contract" and "against covenant of fair dealing" also fail because the Court has already determined that Plaintiff was an employee and that Plaintiff had executed several employment-related documents concerning status as an at-will employee. (Order Granting Defendants' Motion for Summary Jud No. CO5-4087 MJJ, at 7:12-20.) As an at-will employee, Plaintiff cannot sufficiently wrongful termination in breach of an implied contract or in breach of the implied coy faith and fair dealing. Tomlinson v.

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[15] Plaintiff s seventh claim is for wrongful termination.

Qualcomm, 97 Cal. App. 4th 934, 944 (2002) (st express at-will agreement precluded the existence of an implied contract) (citing Sliv, Watkins-Johnson Co., 221 Cal. App. 3d 799, 804-06 (1990); Camp v. Jeffer, Mange!: Marmaro, 35 Cal. App. 4th 620, 630 (1995)). Accordingly, the Court **GRANTS** Dei motion to dismiss as to Plaintiff's wrongful termination claims.

CONCLUSION

The doctrine of claim preclusion is intended to force a plaintiff to explore all develop all the theories, and demand all the remedies in the initial suit. With the exc Plaintiff's fraud and defamation claims, each of Plaintiff's remaining claims were all or could have been litigated, in the First Action. For the foregoing reasons, the Cour Defendants' Motion to Dismiss as to those claims. However, Plaintiff shall have **LEAVE** to **AMEND** his claims for fraud and defamation. Any amended claim for fraud or defemation shell be filed within 30 days of the filing date of this Order.

IT IS SO ORDERED.

Dated: April 1, 2007

_____s/s
MARTIN J. JENKINS
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[file date: July 23, 2007]
[original formatting altered to fit; not a true-copy]

Azadpour	No. C06-03272-MJJ
v.	
Sun Microsystems, Inc.,	
et al.	

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

INTRODUCTION

Before the Court are Defendants Sun Microsystems, Inc. ("Sun" or "SMI"), Matrix Absence Management, Inc. ("Matrix"), Babu Turumella ("Turumella"), and Norman Yeung's ("Yeung") (collectively, "Defendants") Motion to Dismiss Plaintiff's Second Amended Complaint ("SAC").[16] Defendants argue that while Plaintiff's SAC alleges claims against all Defendants for constructive fraud under California Civil Code section 1573, the SAC explicitly denies that any other Defendant other than Sun engaged in conduct that could lead to liability for constructive fraud. Defendants also contend that Plaintiff's claims against Sun are not plead with the requisite particularity required by Federal Rules of Civil Procedure Rule 9(b), nor allege the requisite elements of section 1573. Pro se Plaintiff Mostafa

[16] Docket No. 226.

Aram. Azadpour ("Plaintiff') opposes the motion. For the following reasons, the Court GRANTS Defendants' Motion to Dismiss on all claims.

PROCEDURAL BACKGROUND

A. First Action

Plaintiff first sued Defendants in state court in September 2005 for claims arising out of Sun's termination of Plaintiffs employment and his long term disability benefits under the company's ERISA plan. Defendants timely removed the first suit to this Court, and the Court denied Plaintiffs motion to remand the case on the ground that federal jurisdiction existed. On September 26, 2006, this Court granted Defendants' motion for summary judgment in the first case. Azadpour v. Sun Microsystems, Inc., et al., Case No. CO5- 4087 MJJ.

B. Second Action

Plaintiff then filed a second state court action against Defendants alleging similar claims and causes of actions, all of which were transactionally related to those in the first case. Again, Defendants successfully removed the second case to this Court, and the Court denied Plaintiffs motion to remand based on the existence of federal jurisdiction.
On October 2, 2006, Plaintiff filed his First Amended Complaint ("FAC"). In the FAC, Plaintiff, inter alia, alleged eight causes of action including claims for: negligence, fraud, defamation, breach of contract, and wrongful termination. On April 2, 2007, this Court granted Defendants' motion to dismiss based on the doctrines of collateral estoppel and res judicata. The Court dismissed all of Plaintiffs claims alleged in the FAC, but allowed Plaintiff leave to

amend his fraud and defamation claim to properly plead the elements of fraud or defamation, and with respect to the fraud claim, to plead with the requisite particularity required by the heightened pleading standard. Plaintiff sought voluntary dismissal of his defamation cause of action against Sun which this Court granted.

Plaintiff then filed his Second Amended Complaint ("SAC") on April 30, 2007, which is the operative complaint before the Court. Plaintiff alleges one cause of action for constructive fraud in violation of California Civil Code section 1573 against Defendants Sun, Matrix, Turumella, and Yeung. Plaintiff contends that he incurred undue tax liability when Sun reported approximately $30,000 to the Internal Revenue Service, which he returned to the company uncashed following his layoff from Sun. Plaintiff further contends that upon discovering his W-2 form included the amounts as taxable income he unsuccessfully attempted to seek redress from Sun.

LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Because the focus of a 12(b)(6) motion is on the legal sufficiency, rather than the substantive merits of a claim, the Court ordinarily limits its review to the face of the complaint. See Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). Generally, dismissal is proper only when the plaintiff has failed to assert a cognizable legal theory or failed to allege sufficient facts under a cognizable legal theory. See SmileCare Dental Group v. Delta Dental Plan of

Cal., Inc., 88 F.3d 780, 782 (9th Cir. 1996); Balisteri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). In considering a 12(b)(6) motion, the Court accepts the plaintiff's material allegations in the complaint as true and construes them in the light most favorable to the plaintiff. See Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000).

ANALYSIS

Defendants move to dismiss Plaintiff's SAC with prejudice, pursuant to Federal Rules of Civil Procedure 9(b), and 12(b)(6) on several grounds. Defendants argue that: 1) Plaintiff fails to allege that Defendants Matrix, Turumella, and Yeung engaged in wrongdoing with relation to the fraud claim; 2) Plaintiff fails to adequately plead fraud under Rule 9(b); and 3) Plaintiff fails to adequately allege the elements of constructive fraud against Sun.

A. Plaintiff's Fraud Claims Against Matrix, Turumella and Yeung

Defendants contend that Plaintiff cannot sustain an action against Defendants Matrix, Turumella and Yeung because Plaintiff admits in his SAC that these Defendants engaged in no wrongdoing and caused him no damages. The Court agrees.

Courts are particularly liberal in construing "inartful pleading" by pro se parties. Hughes v. Rowe, 449 U.S. 5, 9 (1980). But allegations in a complaint are binding and a plaintiff can plead himself out of court by pleading facts that undermine

the allegations set forth in the complaint. Jackon v. Marion County, 66 F.3d 151, 153 (7th Cir. 1995).

Here, in referencing these Defendants, Plaintiff explicitly states in his SAC that:

> "I, the above named Plaintiff, allege nothing against [Matrix, Turumella, and Yeung] in relation to SMI's allegedly fraudulent reporting of an income I never accepted from SMI. . . . [They] caused me no damage/harm in relation to the said, alleged, SMI's fraudulent income reporting."

(SAC at 11:243-270.)

By expressly acknowledging that he is not asserting any liability against Matrix, Turumella, or Yeung with respect to his fraud claim and denying that these Defendants caused him any harm, Plaintiff concedes he cannot state a claim against these Defendants. Because these deficiencies cannot be cured by amendment,[17] the Court **GRANTS** Defendants' Motion to Dismiss as to Plaintiff's fraud claim against Defendants Matrix, Turumella, and Yeung.

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[17] Where allegations in an amended complaint contradict those in a prior complaint, a district court need not accept the new alleged facts as true, and may, in fact, strike the changed allegations as "false and sham." Hon. William W. Schwarzer, et al., Federal Civil Procedure Before Trial, § 9:223.5 (2006), citing Bradley v. Chiron Corp., 136 F.3d 1317, 1324 (9th Circ.1998) (A trial judge has the authority to strike pleadings that are "false and sham"); Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1329-30 (9th Cir.1981) (Based on FRCP Rule 11). See also Reddy v. Litton Industries, Inc., 912 F.2d 291, 296 (9th Cir.1990) (grant of leave to amend is grounded on expectation of facts reasonably consistent with those already pled).

B. Plaintiffs Fraud Claim Against Sun

Defendants next contend that, despite being provided with several opportunities to amend his pleading and state a viable fraud claim, Plaintiff fails to plead the facts with sufficient particularity under Rule 9(b) and that Plaintiff also fails to plead the essential elements of constructive fraud against Sun.

1. Rule 9(b)

Defendants insist that Plaintiff must comply with the heightened pleading requirements of Rule 9(b). Rule 9(b) states, "[I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The particularity requirement of Rule 9(b) is designed "to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993). Furthermore, included within this pleading mandate is the requirement that a fraud claim specifically identify when the alleged wrongdoing took place. See Decker v. GlenFed, Inc.,42 F.3d 1541, 1548 n.7 (9th Cir. 1994) (Rule 9(b) requires . . . pleading facts that by any definition are "evidentiary", including "time. . .."); Foley v. Bates, 007 WL 1430096, at *11 (N.D. Cal. 2007) (holding that where Plaintiff's fraud allegations fail to describe when allegedly fraudulent statements were made, "the complaint fails to coherently plead the required elements" of fraud.)

Here, Defendants point to the fact that in his SAC, Plaintiff fails to include information on when

the alleged fraud occurred. In his response, Plaintiff contends that it is the Defendants' burden to show that this information would have been known to Plaintiff. Furthermore, Plaintiff avers that the time he became aware of the erroneous W-2 reporting are properly alleged in his complaint. The Court disagrees.

> In his SAC, Plaintiff states that:
> "[T]he W-2 SMI had reported on my behalf to the State and Federal authorities, for 2004 and 2005, were incorrect.
> . . .
> SMI misrepresented to the California Franchise Tax Board ("FTB") and the Federal Internal Revenue Service ("IRS") by reporting that I had gotten an income from SMI and that SMI withheld taxes on that fictitious income."

(See SAC, 8: 170-174.)

Plaintiff makes no mention of a specific time or time frame when Sun's alleged fraud occurred. Because Plaintiff's complaint merely asserts an allegation of fraud and does not sufficiently assert facts regarding the time period Sun allegedly misinformed the IRS about his tax liability, Plaintiff's complaint does not sufficiently establish a particular instance of fraudulent conduct. Therefore, Plaintiff fails to state a proper claim of fraud against Sun. For this reason, the Court **GRANTS** Defendants' Motion to Dismiss as to Plaintiff's fraud claim against Sun.

2. Fraud

Plaintiff also fails to allege the requisite elements of fraud. In his SAC, Plaintiff alleges Sun engaged in constructive fraud under California Civil Code section 1573. Section 1573 defines constructive fraud as: "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, . . . any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." Courts have summarized the elements of a cause of action for constructive as: (1) a fiduciary relationship; (2) nondisclosure; (3) intent to deceive; and (4) reliance and resulting injury (causation). *Younan v. Equifax Inc.*, 111 Cal. App. 3d 498, 517 fn. 14 (1980); *General American Life Ins. Co. v. Rana*, 769 F. Supp. 1121, 1126 (N.D. Cal. 1991).

Defendants suggest that an essential element of a constructive fraud claim is that there be some "advantage" to the alleged wrongdoer, and Plaintiff's complaint fails to plead the existence of any advantage to Sun. While a claim need not state some advantage to the alleged wrongdoer as Defendant contends, Plaintiff has nevertheless failed to plead the requisite elements under section 1573. For this additional reason, the Court **GRANTS** Defendants' Motion to Dismiss as to Plaintiff's fraud claim against Sun.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss in its entirety. Because Plaintiff has now had three opportunities to

amend his Complaint, the Court **DISMISSES** Plaintiff's claims **WITH PREJUDICE.**

IT IS SO ORDERED.

Dated: July 22, 2007

_____s/s
MARTIN J. JENKINS
UNITED STATES DISTRICT
JUDGE

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Appendix H

Notice of Appeal from C05-04087-MJJ

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IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[file date: October 11, 2006]
[original formatting altered to fit; not a true-copy]

Azadpour	No. C05-04087-MJJ
v.	
Sun Microsystems, Inc., et al.	Notice of Appeal

PLEASE TAKE NOTICE that the Plaintiff is filing this Notice to Appeal the Judgment entered for the said Case which was filed on September 26, 2006.

You are being served this Notice per the Federal Rules of Appellate Procedure (FRAP) Rule 3(a)(1). Pursuant to FRAP.4(a)(1)(A), a plaintiff has (30) days from the date a judgment is filed to file a Notice of Appeal. Enclosed please find a check for the applicable fee (as stated on the CAND's website; current as of July 07, 2006) for $455.00.

This appeal will be based upon: 1) the said Court's Judgment, 2) the Defense's MSJ, 3) Plaintiff's Opposition to the said MSJ, 4) the MSJ Hearing Record, 5) all papers, declarations, depositions, response to interrogatories, response to requests for admission, and disclosed documents filed with the said Case's file, and 6) all hearing transcripts ordered by the Plaintiff.

Dated: October 10, 2006 _____s/s
M. Aram Azadpour, pro se Plaintiff

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Appendix I

US District Court Judgment in C05-04087-MJJ

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IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[file date: September 26, 2006]
[original formatting altered to fit; not a true-copy]

Azadpour	No. C05-04087-MJJ
v.	
Sun Microsystems, Inc.,	
et al.	

JUDGMENT IN A CIVIL CASE

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED

Defendants' Motion for Summary Judgment is **granted.**

Dated: 9/26/2006

_____s/s

Richard W. Wieking, Clerk

By:
Monica Tutson, Deputy Clerk

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Appendix J

US District Court Dispositive Order in C05-04087-MJJ

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IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[file date: September 26, 2006]
[original formatting altered to fit; not a true-copy]

Azadpour	No. C05-04087-MJJ
v.	
Sun Microsystems, Inc.,	
et al.	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Before the Court are Defendants Sun Microsystems, Inc. ("Sun"), Matrix Absence Management, Inc. ("Matrix"), Babu Turumella ("Turumella"), and Norman Yeung's ("Yeung") Motion for Summary Judgment or in the alternative Motion for Partial Summary Judgment.[1] Plaintiff Mostafa Aram Azadpour ("Azadpour") opposes the motion. For the following reasons, the Court GRANTS Defendants' Motion for Summary Judgment on all claims.

FACTUAL BACKGROUND

I. Procedural Background

This case presents an employment dispute between an employee against the employee's former employer and supervisors. On September 12, 2005, Plaintiff filed this lawsuit, as a *pro se* litigant, in the Superior Court of California, County of Santa Clara.

[1] Docket No. 150, Filed July 21, 2006.

On October 11, 2005, Defendants removed the action to this Court pursuant to 28 U.S.C. Section 1441(a) and 1441(b). On March 29, 2006, Plaintiff filed the First Amended Complaint ("FAC") asserting the following claims for relief: (1) breach of contract; (2) "Inequitable Treatment" in violation of the Workforce Investment Act of 1998 ("WIA"); (3) violation of the California Fair Employment and Housing Act ("FEHA"); (4) "conspiracy"; (5) "simple negligence"; (6) "gross negligence"; (7) violation of the Worker Adjustment and Retraining Notification Act ("WARN"); and (8) violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"). Defendants now move for summary judgment on all of Plaintiffs claims.

At all times during this action Plaintiff has remained *a pro se* litigant. On August 15, 2006, due to the voluminous number of motions and notices of motions filed by Plaintiff, many of which lacked grounding in applicable law, and the adjudication of which resulted in the expenditure of considerable judicial resources, this Court Ordered Plaintiff to seek leave of Court before filing any further motions.[2]

II. Operative Facts

Except as otherwise indicated, the following facts are undisputed.

Sun hired Plaintiff in May 2002 to work on the Millennium Project ("the project"). In connection with accepting employment at Sun, Plaintiff executed several documents confirming that his employment was at-will. (Azadpour Deposition

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[2] Docket No. 199, Filed August 15, 2006.

("Depo") at 103:5-14, 104:22-105:15, 105:2225, 106:15-107:14, 110:12-111:17, 114:8-117:19, Exhibits ("Exs.") 4, 5, and 6.) Plaintiff worked for Sun until March 2003. In March 2003 Plaintiff began a medical leave of absence, initially based on a knee and foot injury for which he underwent surgery. (Azadpour Depo at 148:24-149:17.) In June 2003, Plaintiff qualified for and began to receive Long Term Disability ("LTD") Benefits under Sun's LTD plan. (*Id.* at 155:5-156:2.) According to Sun's Director of Human Resources, Sun's LTD plan was an ERISA Plan under which an employee must be unable, for a period of at least 90 days, to perform all of the essential duties of his job due to an illness or injury documented by objective medical evidence. (Gill Declaration ("Decl.") at I 2-3, Ex. A.)

In August 2003, Matrix, Sun's third-party administrator, determined Plaintiff no longer qualified for LTD benefits. Matrix based their determination on reports by Plaintiff's physician, indicating Plaintiff could perform his regular work in a different environment. (Azadpour Depo. at 156:13-167:3, 168:10-14, 168:20-169:20; 170:18-171:18, 175:13-176:13, Exs 9-11.) Specifically, in a letter dated August 14, 2003, Plaintiff's physician indicated that in his opinion, due to a depressive order, Plaintiff "would not be able to function in his former position with the same manager" and that it was "therefore contraindicated for [Plaintiff] to return to his former position" but that Plaintiff "may be able to function without a full relapse in another department with a different manager." (Azadpour Depo., Ex. 9 at p. 3.)

Plaintiff attributes his depression to Defendants' conduct. Plaintiff alleges that his manager,

Turumella, and the Project Director, Yeung, treated Plaintiff unfairly. (FAC at 712-6.) Plaintiff contends Turumella hired a friend as the technical lead on the Project and that Turumella's friend was not competent. (FAC at TT 4-5.) According to Plaintiff, Plaintiff's complaints about Turumella's hiring practices and other complaints about the Project went ignored by Defendants. (Id.) Specifically, Plaintiff contends that Defendants unreasonably pressured him into meeting an unreasonable project-schedule and excessive workload, which caused Plaintiff to transfer from the "management ladder" position to an individual contributor or face being laid off. (FAC at ¶ 5.) As a result of Defendants' treatment of Plaintiff, Plaintiff claims he suffered mental health injuries and was diagnosed with severe depression. (FAC at 6.)

On August 28, 2003, in response to a request for clarification from Matrix, Plaintiff's physician provided a conditional return-to-work statement regarding Plaintiff in which he opined that Plaintiff would "never" be able to return to his usual work, but that he could immediately return to work "in a different group with a different manager who is supportive." *(Id.* at 169:20-169:20, Ex. 10 at p. 2.) On September 30, 2003, based on Plaintiff's physician's conclusions, Matrix'notified Plaintiff that he was no longer eligible for LTD benefits as of August 15, 2003. (Id., Ex. 11.)

On October 7, 2003, rather than return to work, Plaintiff sought review of the denial of his LTD benefits. *(Id.* at 1`76:10-13,'"176:18, 179:21-180:6, 183:14-184:3, 184:22-185:23; Gill Decl. at Tif 3-6, Exs. C and D.) As part of the subsequent review, Plaintiff underwent an Independent Medical

Examination ("IME") by Dr. Mark Snyder ("Dr. Snyder"). (Azadpour Depo. at 183:14-19, 185:1-2; Gill Decl. at 6, Ex. D.) Dr. Snyder concluded Plaintiff could return to work in a different environment, but opined that Plaintiff would not be able to return to work until January 22, 2004. (Azadpour Depo. at 185:1-25; Gill Decl. at ¶ 6, Ex. D) As a result, Defendants extended Plaintiff's LTD benefits to January 21, 2004. (Gill Decl. at 6, Ex. D.) On January 31, 2004, rather than return to work, Plaintiff sought further review of the decision to terminate his LTD benefits. *(Id.* at 6-10, Exs. E-H.) In February 2004, Sun provided Plaintiff with a copy of its Benefits, Earnings, and Handbook. (Id., Ex. F.) On March 12, 2004, Sun's Human Resource representative, Melissa Dawdy ("Dawdy"), informed Sun's ADA specialist, Lyda Sera ("Sera"), that although still on leave, Plaintiff may have an accommodation issue. (Sera Decl. at ¶ 2, Ex. A.) Sera contacted Plaintiff and began the interactive process. *(Id.* at ¶ 3, Ex. B.) Sera outlined the necessary information to engage in the process and explained the need for Plaintiff to obtain a return to work certificate from his doctor verifying that Plaintiff had a qualifying disability, its anticipated duration, the extent to which it limited his essential job functions and any specific recommendations. (Id.) Plaintiff informed Sera that he sought a restriction precluding him from returning to the "same environment that caused the mental stress . . ." *(Id.* at 114, Ex. C.) In early April 2004, Sera provided and reviewed an Accommodation Questionnaire with Plaintiff. *(Id.* at TT 5-7, Exs. D-G.) Sera informed Plaintiff that based on Equal Employment Opportunity Commission's ("EEOC") advice and Sun's past practice, a change of

manager was not typically considered to be a reasonable accommodation. *(Id.* at 7, Ex. G.) Despite Sera's request for Plaintiff to provide a return to work certificate, Plaintiff failed to do so. *(Id.* at 10-11, Exs. KO; Azadpour Depo. at 207:15-17.) In mid April 2004, Sun announced it had eliminated the Project. (Sera Decl. at 9.) Consequently, Sun advised Plaintiff that although he would no longer report to Turumella, thereby eliminating the need for the accommodation of a new manager, Plaintiff still needed to obtain a return to work certification in order to participate in the job search opportunity provided by Sun's ERISA Involuntary Separation Plan. (Id.) On April 13, 2004, Sun advised Plaintiff that they would return him to active status in order to allow Plaintiff to look for alternate work within Sun. *(Id.* at ¶ 10, Ex. J.) Rather than returning to work, Plaintiff asserted his doctor had not released him to return to work, and until his doctor released him, Plaintiff would remain on medical leave. (Id.) Plaintiff never obtained a doctor's release and never returned to work. *(Id.* at 11, Azadpour Depo. at 154:23-155:1.) Pursuant to Sun's leave policy, Sun terminated Plaintiff in March 2005. (Azadpour Depo. at 216:22-218:25, Ex. 18.)

LEGAL STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of demonstrating the basis for the motion and identifying the portions of the pleadings, depositions,

answers to interrogatories, affidavits, and admissions on file that establish the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this initial burden, the burden then shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Anderson*, 477 U.S. at 247-48. An issue of fact is material if, under the substantive law of the case, resolution of the factual dispute might affect the case's outcome. *Id.* at 248. Factual disputes are genuine if they "properly can be resolved in favor of either party." *Id.* at 250. Thus, a genuine issue for trial exists if the non-movant presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in its favor. *Id.* However, "[i]f the [non-movant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted).

ANALYSIS

I. Breach of Contract

Plaintiffs first claim is for breach of contract against Sun and Matrix. Plaintiff alleges breach of contract based on certain clauses "set forth in Sun's benefit handbook ("the handbook"). (FAC at 25-27.) Specifically, Plaintiff identifies three sections of the handbook entitled: (1) "Determining

the Ongoing Nature of your Disability"; (2) "Involuntary Separation Plan"; and (3) "Returning from Medical Leave." (Azadpour Depo. at 113:4-10, 113:20-114:13, 259:1-260:18; Gill Decl., Ex. A.)[3]

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[3] On September 12, 2006, during oral argument on Defendants' Motion for Summary Judgment, Plaintiff claimed Defendants had prevented him from deposing certain key witnesses, including Gill and Sera. Additionally, Plaintiff claimed these witnesses were not disclosed by Defendants at any time during the litigation. Plaintiff requested further discovery from this Court to depose these witnesses in an effort to defeat Defendants' Motion for Summary Judgment.

Federal Rule of Civil Procedure 56(f) provides that a district court may refuse to grant movant's application for summary judgment or may order a continuance if the opposing party submits a request for further discovery supported by an affidavit alleging facts essential to defeat summary judgment. Fed. R. Civ. P 56(f). However, a party seeking additional discovery may not "complain if it fail[ed] to pursue discovery diligently before summary judgment." Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986). Additionally, the party must show how allowing for additional discovery would preclude summary judgment. Qualls v. Blue Cross of California, 22 F.3d 839, 844 (9th Cir. 1994); Hall v. State of Hawaii, et al., 791 F.2d 759, 761 (9th Cir. 1986).

Here, although Plaintiff is pro se, he has proven he is capable of filing documents, serving documents, and noticing depositions. Plaintiff has filed numerous motions in this Court and admitted during oral argument that he had already taken the depositions of some of Defendants' employees. Plaintiff has not made a Rule 56(f) motion for additional discovery nor has he submitted the necessary affidavits to support his claim for further discovery. See Fed.R.Civ.P 56(f); see also Brae Transp., Inc., 790 F.2d at 1443. Nothing in this record indicates that Plaintiff diligently pursued depositions from Gill or Sera prior to the Motion for Summary Judgment. See id. Moreover, Plaintiff could not explain how the addition of Gill and Sera's depositions would preclude summary judgment. See Qualls, 22 F.3d 839 at 844 ; Hall, 791 F.2d at 761. As such, the court denies his request for further discovery.

Defendants counter that Plaintiffs breach of contract claim fails because: (1) Plaintiff's employment was at-will; (2) Plaintiff has failed to plead and offer proof of any violations of any enforceable provision of any relevant Sun policy or procedure; (3) Plaintiff's contract claims are preempted by ERISA; and (4) Plaintiffs contract claims relating to Worker's Compensation benefits are precluded by the exclusive remedy provisions of the California Workers' Compensation Act. The Court agrees with Defendants.

To prevail on a claim for breach of contract, a plaintiff must plead and prove the existence of a

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The Court also notes that during oral argument Plaintiff asserted he was unaware that Gill or Sera were potential material witnesses in this litigation. The record does not support Plaintiff's assertion. The federal rules require all parties to initially disclose all potential witnesses. See Fed. R. Civ. Pro. 26(a)(1)(A). Non-disclosed evidence is not permitted to be used at a hearing unless substantially justified or unless the failure to disclose is harmless. See Fed. R. Civ. Pro. 37(c)(1). The drafters of Rule 37, however, intended for exceptions to this rule for "inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties." See Fed. R. Civ. Pro. 37(c)(1) advisory committee's note. The record indicates that Plaintiff was well aware of Gill and Sera as potential witnesses. Plaintiff had continuous contact with both Gill and Sera. Specifically, Plaintiff received at least three letters from Gill, and wrote at least one more to Gill, regarding Plaintiff's LTD coverage. (See Gill Decl., Exs. D, F, G, and H.) As to Sera, Plaintiff and Sera exchanged at least 15 e-mails between January 2004 and June 2004. (See Sera Decl., Exs. B 0.) In light of this regular and well-documented contact with the witnesses, Plaintiff cannot assert that he was unaware that Gill and Sera would be potential witnesses. Therefore, the witnesses were "known to all parties" and Defendants' failure to include Gill and Sera in their Rule 26 disclosures was harmless.

contract, that plaintiff performed his duties under the contract or that his performance was otherwise excused, that defendant breached the contract by failing to perform, and that plaintiff suffered resulting damages. *Otworth v. Southern Pac. Transp.*, 166 Cal. App. 3d 452, 458 (1985) (citations omitted). In California, an employment having no specified term may be terminated at the will of either party on notice to the other. *See* Cal. Lab. Code § 2922; *see also Guz v. Bechtel Nat., Inc.* 24 Cal. 4th 317, 335 (2000). Unless the parties mutually agree that the employment may only be terminated for good cause, there is a strong presumption of at will employment, and any such employment agreement must be clear "from the parties' conduct evidencing their actual mutual intent to create such enforceable limitations." *Guz*, 24 Cal. 4th at 336 (citing *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 680 (1988)). Moreover, a written acknowledgment that "employment is at will and can be terminated at any time with or without cause" defeats a claim of implied contract as a matter of law. *See, e.g., Guz*, 24 Cal. 4th at 340 (internal citations omitted). Defendants are correct in stating that Plaintiff has not alleged or offered evidence of a contract between the parties. Plaintiff acknowledged at his deposition that he executed several employment-related documents confirming that his employment was at-will. Additionally, Plaintiff has offered no persuasive evidence to refute the existence of an at-will relationship. None of the three provisions of the handbook identified by Plaintiff evidence the existence of anything other than an at-will relationship. To the contrary, it was Plaintiff, by failing to obtain a return to work certificate, who

failed to adhere to the identified handbook provisions. For these reasons the Court finds that summary judgment in favor of the Defendants is appropriate with respect to Plaintiffs breach of contract claim.[4]

II. Inequitable Treatment

Plaintiffs second claim is against Sun for "Inequitable Treatment" under the Federal Workforce Investment Act of 1998, 29 U.S.C. § 2801 *et seq.* Defendant contends that Plaintiffs WIA claim fails as a matter of law because the WIA does not authorize a private right of action for "Inequitable Treatment." The Court agrees with Defendant.

The WIA does not provide for a private cause of action for "Inequitable Treatment." *See Borreo-Rodriguez v. Montalvo-Vazquez*, 275 F. Supp. 2d 127, 130-32 (D. Puerto Rico 2003) (explaining that neither the WIA nor its implementing regulations authorize

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[4] The Court further finds that Plaintiff has failed to offer evidence or persuasive authority refuting Defendants' contentions that Plaintiffs claim is preempted by ERISA and/or otherwise precluded by the exclusive remedy provision of the California Workers' Compensation Act. First, an ERISA "employee benefit plan" is any plan established or maintained by an employer for the employees for the purpose of providing pension, disability, medical, unemployment, severance, welfare or similar benefits or services. See 29 U.S.C. § 1002(1)-(3). Sun's plans, as summarized in the handbook, are employee benefit plans governed by the preemptive provisions ofERISA, and therefore preempt Plaintiffs breach of contract claim. (See Gill Decl., Ex. A.) Second, to the extent Plaintiff rests his contract claim on Matrix's denial of any Workers' Compensation benefits, the claim is precluded by the exclusive remedy of the Workers Compensation Act. Cal. Lab. Code §§ 3600 et seq., 5300 et seq.

a private remedy). Plaintiff fails to cite any legal authority or articulate a legal basis for his second claim. As a result, the Court grants Defendants' motion for summary judgment as to Plaintiff's second claim.

III. Fair Employment and Housing Act

Plaintiff's third claim is against Sun, Turumella, and Yeung, alleging a violation of the California Fair Employment and Housing Act. The Court first addresses the claim against the individual defendants and then the claim against Sun.

A. Turnmella and Yeung

Defendants argue that Plaintiff's FEHA claims fail as to Turumella and Yeung because (1) Plaintiff failed to exhaust his FEHA administrative remedies as to the individual Defendants; (2) the individual Defendants cannot be subject to individual liability for discrimination under FEHA; and (3) to the extent Plaintiff argues that his FEHA claim against the individual Defendants is one for harassment or retaliation, and not discrimination, the claim is jurisdictionally barred because Plaintiff failed to assert either theory in his Department of Fair Employment and Housing ("DFEH") charge. Plaintiff responds in part, and argues "there is no FEHA requirement that the Administrative means has to be concluded." *(See* Opposition at 10:226.)

In examining Defendants' first argument, it is generally true that no lawsuit may be maintained against persons not mentioned in the administrative charge. *See* Justice Ming Chin, David A. Cathcart, Alan B. Exelrod, Justice Rebecca A. Wiseman, *California Practice Guide: Employment Litigation, §*

16:315, The Rutter Group (2005) ("Rutter Guide"). "In order to bring a civil lawsuit under the FEHA, the defendants must have been named in the caption or body of the DFEH charge." *Id.* (citing *Cole v. Antelope Valley Union High School Dist.*, 47 Cal. App. 4th 1505, 1511 (1996); *see Medix Ambulance Service, Inc. v. Super.Ct. (Collado)*, 97 Cal. App. 4th 109, 116 (2002). However, although not named, if the persons are identified in the body of the DFEH complaint as perpetrators, they are subject to suit under the FEHA. *See Antelope Valley High School Dist.*, 47 Cal. App. 4th at 1511; *Saavedra v. Orange County Consolidated Transp. Serv. Agency*, 11 Cal. App. 4th 824, 826-28 (1992).

Here, Plaintiff alleges that he filed a complaint with the DFEH that resulted in the right-tosue notice, which Plaintiff attached to the First Amended Complaint. (FAC at ¶ 13.) However, Plaintiff fails to plead or offer proof that he timely exhausted his administrative remedies against Turumella or Yeung. The caption of the right-to-sue letter only identifies Sun, and not the individual Defendants. Additionally, Plaintiff has failed to put the substance of his DFEH Charge before the Court. Given the absence of any record as to a DFEH complaint against Turumella or Yeung, either in the body or caption of the DFEH Charge, the Court finds an absence of proof of a timely filing. As a result, Plaintiff has failed to establish the jurisdictional prerequisites to a FEHA claim against Turumella and Yeung.

Defendants alternatively argue that the individual Defendants cannot be subject to individual liability for discrimination under FEHA. Plaintiff does not address this argument in his opposition.

Under California law, other than claims for harassment, supervisors are not individually liable for management decisions later considered to be discriminatory. *See* Rutter Guide, § 7:175 (citing *Reno v. Baird,* 18 Cal. 4th 640, 645-46 (stating absent proof of harassment, individual managers and supervisors not liable for employment discrimination under FEHA or under theory of wrongful discharge contrary to public policy) and *Janken v. GM Hughes Electronics,* 46 Cal. App. 4th 55, 62 (1996)). Plaintiff specifically alleges that Turumella and Yeung were in a supervisory role. Thus, even if Plaintiff had exhausted the FEHA jurisdictional prerequisites, his non-harassment FEHA claims against Turumella and Yeung fail as a matter of law.

Lastly Defendants argue that any harassment or retaliation claims are similarly jurisdictionally barred because Plaintiff never asserted either theory of liability in his DFEH Charge. Again, Plaintiff does not directly address this issue in his opposition. FEHA's prohibition against employee harassment and retaliation extends to all employees. *See* Rutter Guide, § 7:179. Thus, in addition to any other available remedy, each employee can be held personally liable under FEHA for harassing or retaliating against another employee because of the employee's membership in a protected classification. *Id.* (citing Cal. Gov. Code §§ 12940(j), 12940(h); *Page v. Super. Ct.* (3Net Systems, Inc.), Cal. App. 4th 1206, 1211-12 (1995).

However, Plaintiff has failed to sufficiently allege, or present any evidence that either Turumella or Yeung engaged in any harassment against Plaintiff due to Plaintiff's membership in any protected classification or Plaintiff's participation in

any protected activity. For these additional reasons, the Court grants Defendants' motion for summary judgment as to Turumella and Yeung.

B. Sun

Plaintiff essentially asserts two FEHA theories of liability against Sun: (1) that Sun failed to provide a reasonable accommodation for Plaintiff's alleged disability of depression; and (2) that Sun failed to properly engage in the interactive process to determine, what if any, reasonable accommodations were available. Sun concedes that Plaintiff's depression can qualify as a mental disability under FEHA, but argues that Sun provided reasonable accommodations and that Plaintiff failed to produce contrary evidence. Again, Plaintiff does not directly address the issue or offer any persuasive authority to the contrary.

FEHA prohibits discrimination against individuals who have a physical or mental disability, or medical condition, that limits a major life activity as defined by the Act. Cal. Gov. Code §§ 1290, 12926.1. FEHA requires employers to make a reasonable accommodation for known disabilities of employees to enable them to perform a position's essential function. Cal. Gov. Code § 12940(m). To successfully establish a FEHA disability claim based on a failure to accommodate, a plaintiff must plead and prove that he suffers from a disability covered by FEHA, that the defendant has failed to reasonably accommodate his disability, and that he can perform the essential functions of the position to which reassignment is sought, with or without an accommodation. *Jensen v. Wells Fargo Bank*, 85 Cal. App. 4th 245, 256 (2000).

In the current case, the Court finds that Sun provided reasonable accommodations to Plaintiff and that Sun properly engaged in the interactive process. Defendants not only provided Plaintiff with the opportunity to take extended medical leave, but also engaged in an interactive process in attempting to help Plaintiff return to work. *See, e.g., Williams v. Genetech, Inc.*, 74 Cal. App. 4th 215, 226 (1999) (citing *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 878 (9th Cir. 1989) (a finite leave of absence has been considered to be a reasonable accommodation under the American With Disabilities Act ("ADA"))). Despite Sun's willingness to assist Plaintiff, Plaintiff failed to obtain and/or provide Sun with the required return-to-work authorization. Thus, the Court finds it was Plaintiff, and not Sun, who refused to engage in the interactive process. Moreover, the Court finds Plaintiff has failed to present evidence indicating that Sun failed to accommodate him. For these reasons, the Court grants Sun's motion for summary judgement on Plaintiffs FEHA claim.

IV. Conspiracy

Plaintiff's fourth claim is for conspiracy against all Defendants. Defendants contend that Plaintiff has failed to establish the necessary elements of the claim and that Plaintiffs claim is barred by the agent's indemnity rule. Plaintiff fails to directly address Defendants' argument in his opposition

The elements of an action for civil conspiracy are (1) formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in furtherance of the common design. *Doctors' Co. v. Super. Ct. (Valencia)*, 49 Cal. 3d 39, 44 (1989).

A civil conspiracy does not give rise to a cause of action unless an independent civil wrong has been committed. *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1062 (2006).

Plaintiff fails to properly plead the elements of conspiracy and fails to offer any evidence supporting evidence of his claim. There is no evidence in the record of any formation or operation of a conspiracy among Defendants, no evidence that Defendants committed wrongful acts in furtherance of a common design, and no evidence that a conspiracy resulted in damages to Plaintiff. Additionally, Plaintiff fails to plead an actionable independent civil wrong as a necessary predicate to his claim for conspiracy. For these reasons, the Court grants Defendants' motion for summary judgment on Plaintiffs conspiracy claim.[5]

V. Negligence

Plaintiff s fifth and sixth causes of action are for simple and gross negligence against all Defendants. Defendants contend that injuries caused by negligence are subject to the exclusive provisions of California's Workers' Compensation Act. Plaintiff does not directly address the issue in his opposition. The Court agrees with Defendants.

---

[5] Even if Plaintiff had pled and presented evidence of a conspiracy among Defendants, neither Turumella or Yeung could be individually liable. Under the "agents immunity rule," employees of a corporation cannot conspire with their corporate employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage. See Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 512 (1994) (citing Wise v. S. Pac. Co., 223 Cal. App. 2d 50, 72 (1963)).

California has "a tripartite system for classifying injuries arising in the course of employment." *See* Rutter Guide, § 5:621 (citing *Fermino Fedco, Inc., 7* Cal. 4th 701, 713 (1994)). First, there are injuries caused by employer negligence, or without employer fault, that are compensated at the normal rate under the workers' compensation system." *Id.* at 713-14. These injuries are subject to workers' compensation exclusivity. "Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under [Labor Code] section 4553." *Id.* These injuries are also subject to workers' compensation exclusivity. *Id.; see also* Cal. Lab. Code § 4553. "Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought." *Fermino, 7* Cal. 4th 714. Intentional conduct is beyond the compensation bargain if it could not be considered a normal risk of employment or is contrary to fundamental public policy. *Id.* at 714-15.

Plaintiff's negligence claims against the different Defendants are as follows. As to Sun, Plaintiff alleges that Sun failed to take action on Plaintiff's requests, failed to follow company procedures, disregarded the law, and engaged in unreasonable delay (FAC at 111 9, 26.). As to Matrix, Plaintiff alleges that Matrix failed to put in place a reliable record keeping system, failed to properly advise Sun, and failed to adhere to industry standards (Id.). As to Turumella, Plaintiff alleges that Turumella concealed vital project information, concealed an intent to hire a third party to work on the project, obstructed

Plaintiff's access to the Sun "computing account," and failed to inform Plaintiff that the project was cancelled in compliance with WARN. (Id.) As to Yeung, Plaintiff alleges that Yeung failed to adhere to Sun's written policies, failed to prevent harassment, and failed to ensure that all "affected employees" of the project received WARN Act notices. (Id.)

The majority of Plaintiff's claims fall under the exclusive provisions of the California Workers' Compensation Act. As to the negligence claims grounded in harassment and retaliation, which would typically fall outside the Workers Compensation Act, Plaintiff has failed to present any evidence to the Court supporting those claims. For these reasons, the Court grants Defendants' motion for summary judgment on Plaintiff's negligence claims.

VI. Worker Adjustment and Retraining Notification Act

Plaintiff's seventh cause of action is against Sun for violation of the WARN Act by failing to provide Plaintiff with the requisite 60 days notice before cancelling the project. Sun argues that Plaintiff has failed to allege the essential elements of a WARN Act claim and, alternatively, Plaintiff cannot establish recoverable damages. Plaintiff fails to substantively address this issue in his opposition.

The WARN Act requires employers planning a "plant closing" or "mass layoff" to provide "affected employees" at least 60 days' written notice. 29 U.S.C. § 2102. Plaintiff has failed to plead, or submit competent evidence, establishing that Sun engaged

in a "plant closing" or "mass layoff" thereby bringing Sun under the provisions of the WARN Act. Plaintiff has similarly failed to plead and prove facts establishing himself as an "affected employee" who was terminated as a result of a "plant closure" or "mass layoff." For these reasons, Plaintiff's WARN Act claims fails.

VII. Health Insurance Portability and Accountability Act

Plaintiff's eighth cause of action is against Matrix for violating HIPPA. Plaintiff alleges that Matrix failed to "put in place a reliable methodology for the safe keeping of one's medical records." (FAC at 27.) Defendants argue that Plaintiff cannot state a claim because HIPPA does not provide a private cause of action.

Defendants are correct. It is well established that HIPPA provides no private right of action or remedy to individuals and instead grants that authority exclusively to the Secretary of Health and Human Services. *See, e.g., Hubbs v. Alamao,* 360 F. Supp. 2d 1073, 1075 (C.D. Cal. 2005); *Wright v. Combined Ins. Co. of Am.*, 959 F. Supp. 356, 363 (N.D. Miss. 1997); *Means v. Ind. Life & Accident Ins. Co.*, 963 F. Supp. 1131, 1135 (M.D. Ala. 1997); *O'Donnell v. Blue Cross Blue Shield of Wyoming,* 173 F. Supp. 2d 1176, 1180 (D. Wyo. 2001). Since HIPPA does not provide Plaintiff with a private right of action against Matrix, Plaintiff's HIPPA claim fails.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motion for Summary Judgment on all claims.[6] IT IS SO ORDERED.

Dated: September 26, 2006

s/s

MARTIN J. JENKINS UNITED STATES DISTRICT JUDGE

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[6] On September 12, 2006,during oral argument on Defendants' Motion for Summary Judgment, this Court gave Plaintiff leave to file a Supplemental Authority List in support of his opposition to Defendants' Motion for Summary Judgment. The Court limited Plaintiff's submission to include only new citations offered in support his opposition to the motion for summary judgment. The Court has reviewed the 25 legal citations provided by Plaintiff and finds the authority to be either completely irrelevant, previously cited in Plaintiff's earlier opposition, and/or non-persuasive. The Court finds that Plaintiff has not presented any new material that offers merit to his original opposition or otherwise sheds light on any genuine issue of material fact in his case.

The Court notes that on August 21, 2006, Plaintiff filed a motion for leave to file additional motions. Among other things, Plaintiff sought leave to amend the First Amended Complaint. Where a plaintiff has had adequate opportunity for discovery and defendant's motion for summary judgment is pending, leave to amend may be denied unless plaintiff can produce "substantial and convincing evidence" supporting the proposed amendment. *Cowen v. Bank United ofTexas, FSB,70* F.3d 937, 944 (7th Cir. 1995); *Parish v. Frazier,* 195 F3d 761, 764 (5th Cir. 1999). Here, Plaintiff has had adequate opportunity for discovery and has failed to proffer or produce evidence supporting a meritorious amendment of his First Amended Complaint. The Court finds that Plaintiffs request to amend the First Amended Complaint at this stage of the litigation, while Defendants' motion for summary judgment is pending, would unduly prejudice Defendants.

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Appendix K

Complaint Pleading in State Court of Origin

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

[singed September 12, 2005]
[original formatting altered to fit; not a true-copy]

Case No. 1-05-CV-048814
[filing clerk stamp dated September 13, 2005]

CIVIL CASE COVER SHEET

Case Name: Mostafa Aram Azadpour v. Sun Microsystems, Inc., et al.

Civil case cover sheet: unlimited

(1) Employment: other employment

(2) This case is "not" complex under rule 1800 of the California Rules of Court.

(3) Type of remedies sought (a) monetary (b) nonmonetary; declaratory or injuctive relief (c) punitive

(4) Number of causes of action: 8 (eight)

(5) this case is "not" a class action suit

Dated: September 12, 2005

_____s/s
Mostafa Aram Azadpour, pro se

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

[file date: September 13, 2005]
[original formatting altered to fit; not a true-copy]

Case No. 1-05-CV-048814
[filing clerk stamp case no.]

Mostafa Aram Azadpour
v.
Sun Microsystems, Inc.,
Matrix Absence Management, Inc.
Mr. Babu Turumella
Mr. Norman Yeung

Pleading Title: (1) Harassment, (2) Retaliation, (3) Denial of Benefits, (4) Discrimination Against Disability, and (5) Wrongful Termination.

Case Synopsis:
I was hired as a manager in May 2002 at Sun Microsystems, Inc. (SMI) and I was pressured by my manager to agree to unachievable schedule, to make certain representations about the project that were not factual, to change rating of employee in favor of Indian-employees, to select a friend of his as a technical lead for which he was not qualified, to credit the work of others to his friend, changing the scope of my responsibly substantially over that which I was hired for and yet not to provide the resources needed, etc. Early on, when I became aware of the real work-situation in my manager's group, I tried to resign from my post and to take a none-management

position. My manager and my director refused to allow this change. My director at one point stated that he has a long-reach in the valley and if I were to quite and to go elsewhere, he can find me.

When I refused to sign up to the schedule that was not achievable, requested accountability from my management, and took steps to protect myself, I was put under additional-pressure and was forced to change position to a none-management post under the threat of being laid off. Once the position-change took place, my manager was uninterested in my work and at some point made gestures that were sexually inappropriate.

Under the circumstance, I was suffering from depression and was hospitalized by my medical doctor in March 2003. Upon release from the hospital, I had a foot surgery previously scheduled, for which I was given a medical disability, too. In August 2003, the subcontractor to my employer, Matrix Absence Management (Matrix) hired to manage SMI's employees out on disability, stated that I am fit to return to work. My doctor disagreed with Matrix's decision and advised me not to return to the same work-place that caused my disability. Hence, I refused to go back to the same work-place, unless there was a reasonable change and an accommodation. However, Matrix stopped my disability payment. Left without any income, I moved out of California to Texas where I have roots and can better manage my expenses. I attempted to reach SMI's human-resource (h/r) to discuss my issues starting in October 2003; however, SMI's h/r continually ignored my communications. Not being

able to go on SMI's campus, my only means of communications were letter, Email, phone, and/or FAX. Therefore, it was very easy for the h/r to ignore me and my requests for communication.

Through dispute with Matrix decision on stopping my disability benefit, I was paid a one lump sum for back disability pay in January 2004. Thereafter, I was not paid any disability benefit. I contacted SMI's h/r, however, SMI was not willing to enter to any discussion leading to a reasonable accommodation so that I could return to work nor attempted to investigate my grievances with my management. Hence, under the advice of my medical doctor, I did not return to the work-place that caused my disability, without a reasonable accommodation by SMI.

In April 2004, I was informed by SMI that I was laid off and my work-group was dissolved. While others in my group were allowed to participate in an on campus interview with other groups within SMI, I was denied that opportunity and other benefits such as job re-training or an access to a job-placement service.

My request for a Workers' Compensation benefit was denied by Matrix. When I submitted a request to obtain a copy of the record(s) based upon which Matrix came to its decision, that request was ignored and no cause for the denial-decision was conveyed to me.

In June 2003 I contacted the California State Department of Fair Employment and Housing and

filed a complaint. I have obtained a right-to-sue-packet for the harassment and discrimination against disability from this Department.

Relief Sought Through the Court:
I am seeking a compensation for damages brought upon me including stress and emotional suffering, loss of earning my full-salary, loss of enjoying SMI's benefits, e.g., 401K matching, education funding. Additionally, I am seeking a punitive damage and legal costs as follows:

Actual damage: 18 months at base salary of $135,000.00 per year = $202,500.00

Punitive damage: $202,500.00 x 2 = $405,000.00
Legal costs, jury-trial (capped) = $250.00 per hour for 1,000 hours = $250,000.00

Legal costs, pre-trial settlement (capped) = $250.00 per hour for 500 hours = $125,000.00

Total damages sought = $732,500.00~$857,500.00

Additionally, I am asking the Court:

1) To order SMI to have a h/r staff with the responsibility of assisting employees out on disability.
2) To order SMI to update its benefits manuals to reflect the current state and/or federal laws relevant to employment benefits, including the disability and Workers' Compensation, as well as discrimination and harassment.
3) To order SMI to have a yearly mandatory training for every employee to attend to be

taught the Company policy, any law of the state where SMI has an office and Federal law related to employment, and any law of the state where SMI has an office and Federal law related to employment-benefit.

4) To order SMI to provide a bi-yearly report on case(s) filed by employee(s) on abusive management and on the status of h/r assistance to any employee out on disability to an outfit, government or private, deemed appropriate by the Court to supervise SMI on its adherence to State and/or Federal law(s) related to employment and benefits for a period of five (5) years with a penalty deemed appropriate by the Court for each infraction.
5) To order SMI to publish its case report per line item #4 on a yearly bases within the business pages of any credible paper within the city that SMI has an office for a period of seven (7) years.

Dated: September 12, 2005

_____s/s
M. Aram Azadpour, pro se

[eight counts; on 8 hand-written sheets separately attached]

Plaintiff: Mostafa Aram Azadpour
Defendant: Sun Microsystems, Inc.

Date: May/02 to Apr/04

Failure to take adequate steps/put-in-place-process to prevent management-abuse of its power (e.g., failure to enforce company policy, h/r is incapacitated and/or is uninterested to act when notified of management misconduct and/or failure to follow company policy).

Plaintiff: Mostafa Aram Azadpour

Defendant: Sun Microsystems, Inc.

Date: Aug/03 to Apr/04

Discrimination against disability (e.g., failure to initiate interactive discussion).

Plaintiff: Mostafa Aram Azadpour

Defendant: Sun Microsystems, Inc.

Date: Aug/03 to Feb/04

Denial of benefits (e.g., h/r advisor).

Plaintiff: Mostafa Aram Azadpour

Defendant: Sun Microsystems, Inc.

Date: Apr/04

Wrongful termination (e.g., based upon disability, not allowing to participate in internal job-search/interview after work-force reduction).

Page 5 of 8

Plaintiff: Mostafa Aram Azadpour

Defendant: Matrix Absence Management, Inc.

Date: Aug/03 to Jan/04

Denial of benefits (e.g., h/r advisor, failure to notify for reasonable disability accommodation, disability, workers' compensation, reasonable attempt to investigate cause of disability).

Page 6 of 8

Plaintiff: Mostafa Aram Azadpour

Defendant: Matrix Absence Management, Inc.

Date: Jan/04 to Apr/04

Denial of benefits (e.g., workers' compensation).

Page 7 of 8

Plaintiff: Mostafa Aram Azadpour

Defendant: Mr. Babu Turumella

Date: Jun/02 to Mar/03

Harassment (e.g., pressure to commit acts against company code & legal code, emotional, sexual, retaliation).

Plaintiff: Mostafa Aram Azadpour

Defendant: Mr. Norman Yeung

Date: Jun/02 to Mar/03

Harassment (e.g., pressure to commit acts against company code & legal code, emotional, sexual, retaliation).

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Appendix L

Defendant Sun Microsystems, Inc. Answer Pleading in State Court of Origin

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MICHAEL W. FOSTER (State Bar No. 127691)
DANIELLE OCHS-TILLOTSON (State Bar No. 178677)
DAVID CARDIFF (State Bar No. 184246)
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Attorneys for Defendant
SUN MICROSYSTEMS, INC.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

[singed October 05, 2005]
[original formatting altered to fit; not a true-copy]

MOSTAFA ARAM AZADPOUR
Plaintiff,
v.
SUN MICROSYSTEMS, INC.,
MATRIX ABSENCE MANAGEMENT, INC.,
BABU TURUMELLA,
NORMAN YEUNG,
Defendant.

Case No. 1-05-CV-048814
ANSWER TO COMPLAINT BY DEFENDANT SUN MICROSYSTEMS INC.

Defendant SUN MICROSYSTEMS, INC. answers the Complaint on file herein as follows:

Inasmuch as the Complaint is not verified, under the provisions of California Code of Civil Procedure Section 431.30(d), Defendant denies generally each, every and all of the allegations in said complaint, and the whole thereof, including, but not limited to, the allegations that plaintiff is entitled to any of the relief requested, that Defendant is guilty of any wrongful conduct, whether allegesd or otherwise, and that conduct or omissions of Defendant caused any injury or damage to plaintiff in the manner or amount alleged, to be alleged or otherwise.

WITHOUT WAIVING ANY FOREGOING ANSWERS AND DEFENSES, DEFENDANT, AS AND FOR ITS AFFIRMATIVE DEFENSES TO THE COMPLAINT HEREIN, ALLEGESS AS.FOLLOWS:

FIRST AFFIRMATIVE DEFENSE

1. As and for a first affirmative defense, Defendant alleges that plaintiffs Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

2. As and for a second affirmative defense, Defendant alleges that plaintiffs claims are preempted by applicable state, federal and local laws. Dated: October 05, 2005.

THIRD AFFIRMATIVE DEFENSE

3. As and for a third affirmative defense, Defendant alleges that their actions were at all times privileged or justified.

FOURTH AFFIRMATIVE DEFENSE

4. As and for a fourth affirmative defense, Defendant alleges that the complaint is barred in whole or in part by the doctrines of waiver and estoppel.

FIFTH AFFIRMATIVE DEFENSE

5. As and for a fifth affirmative defense, Defendant alleges that damage suffered by plaintiff, if any, was directly or proximately caused by acts, omissions, carelessness or negligence of plaintiff or his agents. Plaintiffs recovery, if any, should be diminished to the extent that said alleged damages are attributable to said acts, omissions, carelessness or negligence.

SIXTH AFFIRMATIVE DEFENSE

6. As and for a sixth affirmative defense, Defendant alleges that this Court lacks jurisdiction over any portions of plaintiffs purported causes of actions which allege injuries to plaintiffs health, including, but without limitation, plaintiffs claims of humiliation, embarrassment, mental anguish, physical and emotional distress, severe and mental upset, and aggravation, as these claims are within the exclusive jurisdiction of applicable workers' compensation laws of the State of California.

SEVENTH AFFIRMATIVE DEFENSE

7. As and for a seventh affirmative defense, Defendant alleges that plaintiffs claims are barred by any and all applicable statutes of limitations, including, but not limited to, California

Government Code Section 12960 and California Code of Civil Procedure Section 340(3).

EIGHTH AFFIRMATIVE DEFENSE

8. As and for an eighth affirmative defense, Defendant alleges that plaintiff has failed to exhaust his administrative remedies and, thus, plaintiff is barred from pursuing his claims as a matter of law.

NINTH AFFIRMATIVE DEFENSE

9. As and for a ninth affirmative defense, Defendant has been informed and believes, and on that basis alleges, that plaintiff has failed and continues to fail to act reasonably to mitigate his alleged damages, so that plaintiffs claims are thereby barred in whole or in part.

TENTH AFFIRMATIVE DEFENSE

10. As and for a tenth affirmative defense, Defendant alleges that this Court lacks jurisdiction to award damages and recovery requested by the complaint.

ELEVENTH AFFIRMATIVE DEFENSE

11. As and for an eleventh affirmative defense, Defendant alleges that plaintiff has failed to state a claim for punitive damages as a matter of law.

TWELFTH AFFIRMATIVE DEFENSE

12. As and for a twelfth affirmative defense, Defendant alleges that plaintiffs claims are barred and/or recovery of damages is barred or diminished by after-acquired evidence.

THIRTEENTH AFFIRMATIVE DEFENSE

13. As and for a thirteenth affilinative defense, Defendant alleges that plaintiff's claims 24 for employee benefit damages are preempted by the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1001 et. seq.).

FOURTEENTH AFFIRMATIVE DEFENSE

14. As and for a fourteenth affirmative defense, Defendant presently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, available defenses. Defendant reserves herein the right to assert additional affirmative defenses in the event that discovery indicates that they would be appropriate.

WHEREFORE, Defendant prays that plaintiff take nothing from his complaint, that Defendant receives recovery of its fees and costs of suit herein incurred, and for such other and further relief as may be just and proper.

_____s/s

Michael W. Foster, Esquire
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Appendix M

Defendants' Notice of State-Case Removal

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Attorneys for Defendant
SUN MICROSYSTEMS, INC.

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[singed October 10, 2005]
[original formatting altered to fit; not a true-copy]

MOSTAFA ARAM AZADPOUR
Plaintiff,
v.
SUN MICROSYSTEMS, INC.,
MATRIX ABSENCE MANAGEMENT, INC.,
BABU TURUMELLA,
NORMAN YEUNG,
Defendant.

Case No._____
DEFENDANT SUN MICROSYSTEMS INC.'S NOTICE OF REMOVAL OF ACTION UNDER 28 U.S.C. 1441(a) & (b) (Diversity of Citizenship and

Federal Question) Santa Clara County Superior Court Case No. 1-05-CV-048814

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR . THE NORTHERN DISTRICT OF CALIFORNIA:

PLEASE TAKE NOTICE that Defendant SUN MICROSYSTEMS INC. ("SUN") hereby removes the above-captioned action to the United States District Court for the Northern District for California, based on the following facts:

1. At all relevant times, defendant SUN has been, and is, a citizen of California, its state of incorporation, with its principal place of business in the state of California.

2. At all relevant times, defendant MATRIX ABSENCE MANAGEMENT, INC. ("MATRIX") has been, and is, a citizen of California, its state of incorporation, with its principal place of business in the state of California.

3. Defendants BABU TURUMELLA and NORMAN YEUNG are residents of the state of California.

4. Plaintiff MOSTAFA ARAM AZADPOUR is a resident of the state of Texas.

5. On September 13, 2005, an action was first commenced in Superior Court of the State of

California, entitled Azadpour v. Sun Microsystems, Inc., Matrix Absence Management, Inc., Turumella and Yeung, case No..1-05-CV-048814. In said Complaint, Plaintiff Azadpour. seeks recover of disability benefits pursuant to SUN's Long Term Disability Plan, a plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. §1001 et. seq.). Further, Plaintiff seeks recovery of damages in an amount no less than $857,500. Defendant SUN first received notice of this Complaint on October September 22, 2005, when it was served on its registered agent for service of process. A copy of that Complaint is attached to this Notice of Removal as Exhibit A.

6. On October 5, 2005, defendant SUN filed its Answer to the Complaint in Santa Clara County Superior Court, a copy of which is attached as Exhibit B.

7. Pursuant to 28 U.S.C. Section 1441(a), a defendant may remove an action to. federal court "when a plaintiff files in state court a civil action over which the federal district courts would have original jurisdiction based on diversity of citizenship. Caterpillar Inc. v. Lewis (1996) 519 U.S. 61, 68, 117 S.Ct. 467.

8. Pursuant to 28 U.S.C. Section 1332(a), diversity of citizenship exists where "the matter in controversy exceeds the sum or value of $75,000" and the parties are "citizens of different states." In this action, Plaintiff is a resident of Texas and all Defendants are residents of states other than Texas.

9. Pursuant to 28 U.S.C. Section 1441(b), any "civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship of the parties". Where a state law claims falls within the scope of ERISA's civil enforcement provisions, federal preemption is complete and the matter must be heard in the federal courts. Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41,54-55; 107 S.Ct. 1549, 1556-1557. Thus, this action, which seeks disability benefits under an ERISA governed Long Teen Disability Plan, shall be removed to this Court.

10. Pursuant to 28 U.S.C. Section 1446(b), the notice of removal shall be filed within thirty days of the initial pleading or, where the initial pleading is not removable, within thirty days after notice of a pleading or paper "from which it may first be ascertained that the case is one which is or has become removable," except that removal must be filed within one year after . commencement of the action. Murphy Bros. v. Michetti Pipe Stringing, Inc. (1999) 526 U.S. 344, 119 S.Ct. 1322.

11. This case is properly removed under 28 U.S.C. Section 1446(b), as this removal is being filed within thirty days of receipt by SUN of the Complaint.

12. All served Defendants consent to this removal petition.

13. The Complaint and Answer attached hereto represent all pleadings, processes and orders filed in the state Court in this action.

14. In the event the Court should be inclined to remand this action, Defendant SUN requests that the Court issue an order to show cause why the case should not be remanded, giving Defendant (as well as Plaintiff) an opportunity to present proper briefing and argument prior to any possible remand. Because a remand order is not subject to appellate review, such a procedure is appropriate.

Dated: October 10, 2005

_____s/s

Michael W. Foster, Esquire
MICHAEL W. FOSTER #127691
FOSTER & ASSOCIATES
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Oakland, California 94612

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Appendix N

US District Court Orders in C06-03272-MJJ:

i) *upon voluntarily dismissal of disability denied benefit claim*
ii) *upon question of jurisdiction*

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IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[file date: April 24, 2006]
[original formatting altered to fit; not a true-copy]

Azadpour	No. C05-04087-MJJ
v.	
Sun Microsystems, Inc., et al.	Order Granting Plaintiff's Motion to Voluntarily Dismiss Claims

Pending before the Court are Plaintiff's motions to voluntarily dismiss the following claims without prejudice: claims arising from California Worker's Compensation (Doc. No. 87) and claims arising under RICO (Doc. No. 86). Also pending is Plaintiff's motion to voluntarily dismiss with prejudice the following: claims arising from short and long term disability benefits (Doc. No. 88). Defendants have filed statements of non-opposition to these motions. Accordingly, the Court GRANTS Plaintiff's motions to voluntarily dismiss his short and long term disability benefits claims with prejudice and to dismiss his California Worker's Compensation and RICO claims without prejudice. The May 2, 2006 hearing scheduled for these motions is hereby VACATED.

IT IS SO ORDERED.

Dated: April 24, 2006 _____s/s
MARTIN J. JENKINS
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[file date: June 13, 2006]
[original formatting altered to fit; not a true-copy]

Azadpour	No. C05-04087-MJJ
v.	
Sun Microsystems, Inc., et al.	Order Denying Plaintiff's Motion to Remand

Pending before the Court is Plaintiffs Motion to Remand (Doc. No. 96). On September 12, 005, Plaintiff filed an action in the Superior Court of California for the County of Santa Clara against Defendants (the "State Action"). Plaintiff s state complaint alleged harassment, retaliation, denial of benefits, discrimination based upon disability, and wrongful termination. On October 2005, Defendants removed the State Action to this Court. The Court's removal jurisdiction was based upon 28 U.S.C. 1331's federal question jurisdiction, due to preemption based upon Plaintiff's ERISA benefit claims.[1] On

[1] Defendants incorrectly assert that the Court also had removal jurisdiction over this matter under 28 U.S.C. § 1332(a)'s "diversity jurisdiction" provision. Pursuant to 28 U.S.C. § 1441(b), which governs removal jurisdiction, "Any...such action shall be removable only *if none* of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." All of the Defendants were citizens of California at the time the action was flied in California state court. Accordingiy, the case would not have been removable based upon diversity jurisdiction at that time.

March 29, 2006 Plaintiff amended his complaint to allege claims for breach of contract, inequitable treatment, breach of the California Fair Employment and Housing Act, civil conspiracy under California law, simple and gross negligence, violations of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. § 2101 et. seq., and violations of the Health Insurance Portability and Accountability Act (HPAA), 42 U.S.C. § 1320d seq. Subsequently, Plaintiff voluntarily withdrew his ERISA employment benefit claims, his civil conspiracy claims, and his worker compensation claims. (Doc. Nos. 86-88).

In light of Plaintiffs voluntary dismissal of his ERISA claims, Plaintiff now moves for an order remanding this action to state court. Plaintiff argues that the Court no longer has subject matter jurisdiction following the voluntary dismissal of his federal ERISA claims. Although Plaintiff no longer asserts ERISA claims, Plaintiff added federal claims pursuant to HPAA and the WARN act when he amended his complaint. Therefore, the Court has federal question jurisdiction pursuant to 23 U.S.C. § 1331 based upon Plaintiff's federal claims. Accordingly, Plaintiffs Motion to Remand is DENIED. IT IS SO ORDERED.

Dated: June 13, 2006 _____s/s
MARTIN J. JENKINS
UNITED STATES DISTRICT
JUDGE

Rather, the Court had "federal question" jurisdiction under 28 U.S.C. § 1331 due to ERISA preemption.

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Appendix O

Hearing Transcript in C05-04087-MJJ:

i) *Remand Hearing*

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IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[singed February 20, 2006]
[original formatting altered to fit; not a true-copy]

Azadpour	No. C05-04087-MJJ
v.	Remand Hearing
Sun Microsystems, Inc.,	Transcript
et al.	

SAN FRANCISCO, CALIFORNIA TUESDAY,
JANUARY 24, 2006
TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE MARTIN J.
JENKINS, JUDGE
NO. C 05-4087 MJJ
MOSTAFA ARAM AZADPOUR,
PLAINTIFF,
VS.
SUN MICROSYSTEMS, INC.,
MATRIX ABSENCE MANAGEMENT, INC.,
BABU TRUMELLA NORMAN YEUNG,
DEFENDANTS.

SAN FRANCISCO, CALIFORNIA TUESDAY,
JANUARY 24, 2006
TRANSCRIPT OF PROCEEDINGS PAGES 1 - 8
APPEARANCES:
FOR THE PLAINTIFF:

MOSTAFA ARAM AZADPOUR, IN PRO PER

FOR THE DEFENDANTS:
FOSTER AND ASSOCIATES
610 16TH STREET, SUITE 310 OAKLAND,
CALIFORNIA 94612
BY: SUZANNE SOLOMON, ESQUIRE
REPORTED BY: KATHERINE WYATT, CSR, RPR,
RMR - OFFICIAL REPORTER, USDC

CALLING CIVIL MATTER NUMBER 05-04087,
VERSUS SUN MICROSYSTEMS, INC. 24, 2006
9:30 O'CLOCK A.M.

P R O C E E D I N G S

THE CLERK YOU MAY STATE YOUR APPEARANCES.

THE PLAINTIFF: GOOD MORNING. MY NAME IS MOSTAFA AZADPOUR. I'M THE PLAINTIFF IN THIS CASE.

THE COURT: I'M GOING TO ASK YOU TO COME TO THE MICROPHONE, TOO.

THE PLAINTIFF: OH, OKAY.

THE COURT: AND SAY THAT AGAIN.

THE PLAINTIFF: MY NAME IS MOSTAFA ARAM AZADPOUR. I'M THE PLAINTIFF IN THE SAID CASE, YOUR HONOR.

THE COURT: OKAY. ALL RIGHT.

MS. SOLOMON: GOOD MORNING. I AM SUZANNE SOLOMON, FOSTER AND ASSOCIATES. I REPRESENT ALL THE DEFENDANTS.

THE COURT: YES, I REMEMBER YOU, MS. SOLOMON.

MS. SOLOMON: I HOPE THAT'S GOOD NEWS.

THE COURT: OH, YES. SURE. YOU'VE BEEN HERE BEFORE. THAT'S ALL IT MEANS. THIS IS A MOTION FOR REMAND, AND I THINK THE PRINCIPLE; THE LEGAL PRINCIPLES THAT GOVERN THE MOTION ARE FAIRLY WELL STATED. PRIMARILY, THE DEFENDANTS' BRIEF.LET ME SUGGEST TO YOU I DON'T -- I DON'T THINK YOU'VE ESTABLISHED A BASIS FOR DIVERSITY JURISDICTION HERE. YOUR CITATIONS TO THE PLEADING, THEY ARE PRETTY SCANT IN TERMS OF REQUIREMENTS TO ESTABLISH THAT HE'S -- AT THE TIME OF THE FILING OF THE COMPLAINT AND REMOVAL HIS DOMICILE WAS SOMEPLACE OTHER THAN CALIFORNIA. JUST BECAUSE SOMEBODY HAS A POST OFFICE BOX AND BECAUSE THEY SAY IN THEIR PLEADING THAT THEY HAVE GONE TO TEXAS TO BETTER ARRANGE THEIR FINANCES DOESN'T MEAN THEY HAVE GIVEN UP THEIR PREVIOUS DOMICILE. SO IF THAT WERE THE ONLY BASIS I THINK YOU WOULD HAVE PROBLEMS HERE. BUT THE CONCERN I HAVE IS THAT YOU, YOU KNOW, YOU MAY NOT

ABSOLUTELY COMPREHEND THIS, BUT LOOKS TO ME -- AND WE WANT TO TALK ABOUT THIS -- THAT YOU HAVE -- YOU'RE SEEKING A CLAIM FOR BENEFITS FOR DENIAL OF YOUR LONG-TERM DISABILITY PAYMENTS.

THE PLAINTIFF: MAY I RESPOND? YOUR HONOR, THAT'S ONE ACTIONABLE CAUSE IN THE CASE. PURSUANT TO THE DENIAL OF THE LONG-TERM DISABILITY THERE ARE SUBSEQUENT ACTIONABLE CAUSES, ONE OF WHICH IS WHAT'S GOVERNED-BY THE STATE OF CALIFORNIA'S FAIR EMPLOYMENT AND HOUSING ACT FOR FAILURE TO PARTICIPATE IN AN INTERACTIVE DISCUSSION WITH A GOOD FAITH AIM TO ACCOMMODATE DISABILITY AS STATED BY THE. RELEVANT MEDICAL DOCTORS, INCLUDING THE IME, THE INDEPENDENT MEDICAL EXAMINER, THAT WAS HIRED BY THE ADMINISTRATOR. FURTHERMORE, THERE WERE OBSTRUCTION-OF FILING FOR THE WORKERS' COMPENSATION. SO IT'S THE TOTALITY OF THAT.

THE COURT: SO LET ME JUST MAKE SURE I UNDERSTAND. THE PLAINTIFF: YES, YOUR HONOR.

THE COURT: YOU HAVE ONE CLAIM FOR THE DENIAL OF DISABILITY BENEFITS UNDER THEIR WELFARE PLAN.

THE PLAINTIFF: YES, YOUR HONOR.

THE COURT: THEN, YOU HAVE SEPARATE CLAIMS FOR FAILURE TO ACCOMMODATE YOU IN TERMS OF DISABILITY DISCRIMINATION AND WORKERS' COMP BENEFITS.

THE PLAINTIFF: AND THEN WRONGFUL TERMINATION, YOUR HONOR, AND SUBSEQUENT OTHER ASPECTS, ONE OF WHICH IS THE FEDERAL WORKERS, THEIR REDUCTION AND THE TRAINING THAT WAS DENIED, AS WELL. AGAIN, YOU'RE ABSOLUTELY RIGHT. I MAY NOT COMPREHEND THE PROCEDURE PROPERLY, BUT IN MY MIND'S EYE I PUT THEM IN SEPARATE ACCOUNT PER THE PAPERS THAT HAVE BEEN FILED, THE STATE. AND I HAVE A COPY OF THAT ENTIRE FILE HERE FOR YOUR REVIEW, IF YOU WISH TO.

THE COURT: WELL, LET ME HEAR FROM MS. SOLOMON. SHE MAY HAVE SOMETHING TO WEIGH IN ON THIS.

MS. SOLOMON: WELL, IF THE COURT IS NOT INCLINED TO DENY THE MOTION ON THE BASIS OF FEDERAL QUESTION JURISDICTION BECAUSE OF AN ERISA CLAIM, I WOULD REQUEST TIME TO DO SOME DISCOVERY.

THE COURT: DID YOU, BY THE WAY, ATTACH THE COMPLAINT TO YOUR REMOVAL NOTICE?

MS. SOLOMON: NO, WE FILED THAT ON FRIDAY.

THE COURT: THE RULE REQUIRES YOU DO THAT.

MS. SOLOMON: IT DOES.

THE COURT: WHY DIDN'T YOU?

MS. SOLOMON: IT WAS BEFORE I JOINED THE FIRM. IT WASN'T ME, WHICH I HATE TO SAY, BUT I CAN'T ANSWER WHY IT WASN'T DONE.

THE COURT: SO IF I WERE GOING TO LEVY SANCTIONS I SHOULD PICK SOMEBODY ELSE IN THE FIRM? YOU WANT TO GIVE UP THAT NAME, MA'AM? WELL, THAT'S THE POSITION YOU PUT ME IN WITH THAT ANSWER.

MS. SOLOMON: I BELIEVE IT WAS MICHAEL FOSTER WHO DID IT.

THE COURT: ALL RIGHT. OKAY. SO LET'S TALK ABOUT WHETHER OR NOT THERE'S A FEDERAL QUESTION HERE BASED ON WHAT MR. AZADPOUR HAS JUST SAID.

MS. SOLOMON: I BELIEVE THERE IS. I MEAN, HE'S ADMITTED THAT HE IS SEEKING DISABILITY BENEFITS. IT'S AN ERISA PLAN. HE HASN'T OFFERED ANY ARGUMENT THAT IT ISN'T AN ERISA PLAN. WE PUT THE PLAN BEFORE THE COURT. IT CLEARLY SAYS IT'S AN ERISA PLAN IN THE DECLARATION.

THE COURT: I THINK SHE'S RIGHT ON THIS. THAT'S THE PROBLEM. YOU KNOW,

GENERALLY, YOUR PLEADING IS GOVERNED BY A PRINCIPLE THAT MAKES YOU THE MASTER OF THE PLEADING. SO WHATEVER YOU PLEA YOU CAN DETERMINE IN THE PLEADING WHETHER THIS COURT ACTUALLY WOULD HAVE JURISDICTION. THAT'S CALLED A "WELL-PLEADED COMPLAINT DOCTRINE." BUT THERE'S A COROLLARY TO THAT WITH RESPECT TO CERTAIN STATUTES. ONE OF THEM IS THE ERISA STATUTE, BECAUSE WHEN CONGRESS ENACTED THIS STATUTE IT WAS CONCERNED ABOUT UNIFORMITY OF DECISIONS WITH RESPECT TO WELFARE BENEFIT PLANS ACROSS THE COUNTRY. IT HAS BEEN INTERPRETED BY THE SUPREME COURT THAT STATUTE HAS A VERY FAR-REACHING PREEMPTIVE FORCE.
AND WHEN WE SAY "PREEMPTION" IT MEANS THAT A CLAIM EVEN STATED AS A STATE LAW CLAIM THAT SEEKS BENEFITS UNDER A WELFARE CLAIM AS DEFINED UNDER THE ERISA STATUTE, THAT THAT STATE LAW CLAIM GETS RECAST AS AN ERISA CLAIM, AS A FEDERAL CLAIM AFFORDING THIS COURT JURISDICTION. AND YOU SEEK TO LITIGATE THE QUESTION OF WHETHER OR NOT YOUR BENEFITS WERE WRONGFULLY STOPPED OR TERMINATED, BENEFITS WHICH FLOW AND REQUIRE DETERMINATION AS TO WHETHER OR NOT THEY WERE CORRECT IN STOPPING THE BENEFITS UNDER THE WELFARE PLAN THAT YOU BRING TO THIS COURT TO BE DETERMINED.

THE PLAINTIFF: YOUR HONOR, AS I CITE -

THE COURT: AND THAT'S IRRESPECTIVE OF WHETHER OR NOT YOU HAVE OTHER COMMON LAW CLAIMS OR STATUTORY CLAIMS.

THE PLAINTIFF: AS I CITED IN MY INITIAL MOTION TO REMAND, THE STATUTE, THE ERISA HAS.A SPECIFIC SECTION ALLOWING FOR THAT TYPE OF A CLAIM THAT I'M BRINGING TO BE BROUGHT AT A STATE COURT OF COMPETENT, WIIICH THE STATE COURT OF CALIFORNIA WAS.

THE COURT: RIGHT. BUT I CAN'T DECLINE JURISDICTION AS A BASIS FOR IT. I CAN'T GRANT YOUR MOTION.

THE PLAINTIFF: YOUR HONOR, THEIR CLAIM, IF I UNDERSTAND IT, IS THAT THEY ARE TAKING ERISA AS THE OVERARCHING AUTHORITY HERE.

THE COURT: THEY ARE ASSERTING THE FEDERAL STATUTE AND THE CLAIM THAT'ARISES UNDER A FEDERAL STATUTE AS A BASIS THAT ALLOWS THE CASE TO BE BROUGHT HERE IN A COURT OF LIMITED JURISDICTION AND NOTHIING ELSE.

THE PLAINTIFF: OKAY. WITH THAT SAID, THE LETTER OF THE ERISA AS I CITED IN MY MOTION, IN MY MOTION TO REMAND, ALLOWS FOR THE PLAINTIFF TO CHOOSE WHICH. VENUE HE OR SHE WISHES TO FILE, AND THE

COURT OF COMPETENT, WHICH WAS THE SUPERIOR COURT OF CALIFORNIA, DOES, IN FACT, HAVE A JURISDICTION BASED UPON THE ACTUAL LETTER OF THE ORIGIN.

THE COURT: ALL RIGHT. SO THE COURT HAS HEARD ARGUMENT AND IT WILL DENY THE MOTION FOR REMAND. THE CASE WILL REMAIN HERE. AND IF YOU'LL PREPARE AN ORDER REFLECTING THAT THE COURT HAS FOUND THAT THERE IS A FEDERAL QUESTION BASED ON THE RECORD AND COMPLAINT IN THIS MATTER AND EVEN THE PLAINTIFF'S ADMISSIONS WITH RESPECT TO THE INDEPENDENT NATURE OF THE CLAIM SEEKING BENEFITS UNDER THE WELFARE PLAN THAT ARISES.-- FALLS WITHIN THE AMBIT OF THE ERISA STATUTE AFFORDING THE COURT A BASIS FOR JURISDICTION IN THE MATTER REQUIRING THAT THE MOTION TO REMAND BE DENIED.
OKAY. THANKS FOR COMING.

MS. SOLOMON: THANK YOU.

THE PLAINTIFF: THANK YOU, YOUR HONOR.
(THEREUPON, THIS HEARING WAS CONCLUDED.)

Dated: February 20, 2006

_____s/s
Katherine Wyatt
OFFICIAL REPORTER -- U.S. DISTRICT COURT
INVOICE NUMBER 1263

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(2)

No. 08-995

IN THE
Supreme Court of the United States

MOSTAFA ARAM AZADPOUR,

Petitioner,

v.

SUN MICROSYSTEMS, INC.,
MATRIX ABSENCE MANAGEMENT, INC.,
BABU TURUMELLA and NORMAN YEUNG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL W. FOSTER
DAVID J. CARDIFF*
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QUESTIONS PRESENTED

I. Whether Petitioner provided a compelling reason for the granting of this Petition for Writ of Certiorari pursuant to Rules of the Supreme Court, Rule 10.

II. Whether the district court is deprived of jurisdiction when, subsequent to removal, a litigant dismisses the claims that gave rise to removal jurisdiction.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents Sun Microsystems, Inc. and Matrix Absence Management, Inc., state that they have no parent corporations, nor are there any publicly held companies that owns 10% or more of the stock or equity interest of either of these Respondents.

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TABLE OF CITED AUTHORITIES

Cited Authorities

STATEMENT OF THE CASE

A. Proceedings Below

On September 12, 2005, Petitioner filed his original complaint in the Superior Court of the State of California, Santa Clara County, alleging, in part, that Respondent Sun Microsystems, Inc. ("Sun") wrongfully denied him long-term disability benefits pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA," 29 U.S.C. section 1001 *et seq.*), 401k matching funds, and education-related reimbursements. Petitioner sought injunctive relief, including supervision of Sun's ERISA plans, and an order directing Sun to amend its "benefits manual." The remainder of the complaint sought relief for alleged employment discrimination in violation of the California Fair Employment and Housing Act ("FEHA," California Government Code section 12940 *et seq.*) against Sun and Petitioner's former supervisors and managers.

On October 11, 2005, Respondents removed the case to the United States District Court, Northern District of California, arguing that Petitioner's attempt to recover long-term disability benefits pursuant to ERISA fell "within the scope of ERISA's civil enforcement provisions," making the matter completely preempted by federal law and conferring original subject matter jurisdiction on the district court.

On November 1, 2005, Petitioner filed a motion to remand, in which he expressly conceded that his complaint implicated ERISA, but argued that "a state court is not explicitly barred from hearing an ERISA

related case" and that his ERISA claim was "not an overarching matter eclipsing other counts." On January 30, 2006, the district court denied Petitioner's remand motion on the grounds that subject matter jurisdiction existed.

Petitioner responded by filing a first amended complaint that removed all references to ERISA, but included claims for violation of the federal Worker Adjustment and Retraining Notification Act ("WARN," 29 U.S.C. § 2101 *et seq.*) and Health Insurance Portability and Accountability Act of 1996 ("HIPAA," 42 U.S.C. § 1320d *et seq.*) On April 24, 2006, Petitioner filed a "Motion to Consider Question of Jurisdiction," in which he argued that, due to his voluntary dismissal of claims for disability benefits, the district court no longer had subject matter jurisdiction, and the matter should be remanded to state court. The court, construing Petitioner's motion as a renewed motion to remand, issued an order dated June 13, 2006, denying said motion. *See* Petition, Appendix N(2). Specifically, the court held that the subsequent amendment of Petitioner's complaint did not deprive the court of subject matter jurisdiction, if said jurisdiction existed at the time of removal and, regardless, Petitioner's amendments contained claims based upon federal statutes, including WARN and HIPAA.

On July 21, 2006, Respondents filed a motion for summary judgment setting forth numerous grounds for dismissal, including Petitioner's lack of evidence to support his claims, as well as various legal defenses. On September 26, 2006, the district court issued a written order granting Respondents' motion in its entirety. *See* Petition, Appendix J.

On April 17, 2006, Petitioner initiated a second action against Respondents in state court, in which ERISA was not expressly mentioned, but in which Petitioner again sought relief for alleged denial of long-term disability benefits (under a breach of contract theory). Again, Respondents removed the matter and, on November 28, 2006, the district court denied Petitioner's motion to remand. *See* Petition, Appendix G (2). Thereafter, on April 2, 2007, the district court granted Respondent's motion to dismiss this second action, based largely on *res judicata* grounds. *See* Petition, Appendix G.

Petitioner appealed both the summary judgment order in his first action and the dismissal order in his second action, and those two appeals were consolidated into a single appellate docket. On July 11, 2008, the Ninth Circuit Court of Appeals affirmed both decisions of the district court. *See* Petition, Appendix D. On October 15, 2008, the circuit court denied Petitioner's petition for panel rehearing. *See* Petition, Appendix B.

B. Factual Summary

Sun hired Petitioner in May 2002 to work on its Millennium Project. In March 2003, less than a year after his hire, Petitioner took medical leave based on a foot injury. At some point thereafter, his claim morphed into one for depression and, in June 2003, Petitioner began receiving benefits under Sun's long-term disability plan, an ERISA covered benefits plan.

In August 2003, Respondent Matrix Absence Management, Inc. ("Matrix") determined that Petitioner no longer qualified for long-term disability benefits

based on reports by Petitioner's physician that he was fully able to work. Petitioner responded by submitting a "Progress Report," in which he disputed his own physician's conclusions. Thereafter, Matrix sought and received a further report from Petitioner's physician confirming that Petitioner could immediately return to work. Thus, on September 30, 2003, Matrix notified Petitioner that, as of August 15, 2003, he was no longer eligible for long-term disability benefits.

Rather than returning to work, Petitioner appealed Matrix's decision by requesting an Independent Medical Examination ("IME") under the appeal provisions of the long-term disability plan. In December 2003, the IME report again concluded that Petitioner could return to work effective January 22, 2004. Nonetheless, Petitioner again refused to return to work, claiming that he was totally disabled.

In early March 2004, notwithstanding Petitioner's continued assertion that he was totally disabled, Sun's human resources department attempted to engage him in a reasonable accommodation interactive process. As part of this process, Sun requested a return to work certification verifying the existence of a qualifying disability, and asked Petitioner to state the anticipated duration of the disability, identify the extent to which said disability limited essential job functions, and provide any specific recommendations on accommodation. Petitioner refused to provide any such information, stating instead that he would return to work only if he was assigned a new manager.

In April 2004, Sun announced the cancellation of the Millennium Project. Sun advised Petitioner that he should provide the medical information requested as part of its interactive process, and return to work to look for other opportunities within the company. Petitioner responded that he had not been released to work from his physician and, thus, he refused to provide the information and/or seek other job opportunities within Sun. Petitioner's position was eliminated as a result of the cancellation of the Millennium Project, and his employment was terminated after he refused to return from leave for over 24 months.

SUMMARY OF ARGUMENT

Despite the complete absence of any meaningful reason for this matter to be heard by the United States Supreme Court, this Petition rehashes unmeritorious claims related to the district court's refusal to remand a case after Petitioner amended his complaint. This case does not involve a conflict in decisions made by different Circuit courts, an important federal question decided in a way that conflicts with a decision by a state court of last resort, an important question of federal law that has not been, but should be, settled by this Court, or a departure from well-settled law calling for an exercise of this Court's supervisory power.

Moreover, the decision about which Petitioner complains was properly reached by the district court and properly affirmed on appeal. Specifically, Petitioner contends that the district court erred in refusing to remand his complaint, despite that it contained allegations of ERISA violations, because he removed said allegations in subsequent amendments. Petitioner

ignores long standing precedent that a district court may retain jurisdiction regardless of pleading amendments, if jurisdiction existed at the time of removal. Finally, Petitioner distorts the ruling of the district court to argue that ERISA cannot preempt claims brought under state anti-discrimination laws, despite that said court made no such ruling. Instead, summary judgment on Petitioner's discrimination claims was granted based on the lack of evidence in support submitted by Petitioner.

REASONS FOR DENYING THE PETITION

I. Absence Of Compelling Reasons To Grant Petition

The decisions of the courts below do not involve a conflict with any decision of this Court, any courts of appeal, or any state courts of last resort. Moreover, Petitioner does not allege that the case involves an important question of federal law that has not been, but should be, settled by this Court. Instead, Petitioner merely asserts that the district court and Ninth Circuit "got it wrong" when they concluded that subject matter jurisdiction existed in this case. Further, Petitioner contends that the district court misapplied well-settled law to this particular set of facts when granting summary judgment in favor of Respondents. These are grounds on which a petition is "rarely granted." Accordingly, the Petition fails to establish "compelling reasons" for review, and must be denied.

II. Petitioner's Subject Matter Jurisdiction Claims Are Wholly Without Merit

Throughout the litigation and appeals process, Petitioner has consistently failed to convince any court that the district court reached a wrong decision on an issue it faces on a daily basis: federal subject matter jurisdiction. At the time Respondents removed Petitioner's state court complaint to the district court, ERISA preemption existed – this has never been disputed by Petitioner. The law is clear that, where removal jurisdiction exists, the district court may elect to retain jurisdiction, even where the original cause of action that prompted removal is later dismissed.

As Respondents have consistently pointed out in response to various motions and the two appeals filed by Petitioner, preemption under ERISA Section 514(a) is very broad. *See, e.g., DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 412 (9th Cir. 1994). ERISA, by its terms, "supersedes any and all state laws insofar as they . . . relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). ERISA's preemption clause contains "deliberately expansive language" that was "designed to establish pension plan regulation as exclusively a federal concern." *DeVoll, supra*, 35 F.3d at 412, *quoting Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 482, 112 L. Ed. 2d 474 (1990) (internal quotations omitted). The Ninth Circuit has expressly held that this clause preempts state law claims founded on theories of negligence, breach of contract, breach of covenant, and civil conspiracy. *See, e.g., DeVoll*, 35 F.3d at 412, *citing Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1095 (9th Cir. 1985) (breach of contract); *Lea v. Republic Airlines, Inc.*,

903 F.2d 624, 631-32 (9th Cir. 1990) (negligence). Under the circumstances of this case, there was simply no dispute that many of Petitioner's state law claims in both lawsuits implicated ERISA preemption.

Petitioner contends that his decision to amend his pleadings post-removal required the district court to remand the matter to state court. Yet, as confirmed by the Ninth Circuit in this case, for purposes of determining whether a district court retains jurisdiction of a case following removal, a litigant's amendment of pleadings or dismissal of particular causes of action does not control. Simply put, jurisdiction is determined at the time of removal, and not thereafter. *See Reddam v. KPMG LLP*, 457 F.3d 1054, 1058 n. 6 (9th Cir. 2006). Thus, even had Petitioner, subsequent to removal, completely excised all allegations that implicated ERISA, and not included his WARN or HIPPA claims (leaving only state court claims), the district court would not have been deprived of subject matter jurisdiction. *See, e.g., Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998) (a "plaintiff may not may not compel remand by amending a complaint to eliminate the federal question upon which removal was based.")

III. Petitioner Distorts The District Court's Ruling On His FEHA Claim

In his Petition, Petitioner suggests that the district court granted summary judgment on his FEHA discrimination claims based on ERISA preemption. Nothing could be further from the truth.

As stated in the district court's order on summary judgment, Petitioner's disability discrimination claim was not dismissed on procedural grounds but, instead, the court expressly held that no evidence existed that Sun failed to engage in the interactive process, failed to provide a reasonable accommodation, or otherwise discriminated against Petitioner. The court stated:

> In the current case, the Court finds that Sun provided reasonable accommodations to Plaintiff and that Sun properly engaged in the interactive process. Defendants not only provided Plaintiff with the opportunity to take extended medical leave, but also engaged in an interactive process in attempting to help Plaintiff return to work. (Cites omitted.) Despite Sun's willingness to assist Plaintiff, Plaintiff failed to obtain and/or provide Sun with the required return-to-work authorization. . . . Moreover, the Court finds Plaintiff has failed to present any evidence indicating that Sun failed to accommodate him. *See* Petition, Appendix J (15 & 16).

As ERISA preemption was not the grounds for dismissal of Petitioner's FEHA claims, Petitioner's argument is without merit.

CONCLUSION

Petitioner has not met his burden to establish any compelling reasons for this court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

MICHAEL W. FOSTER
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(510) 763-1900

Counsel for Respondents

* *Counsel of Record*

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No. 08-995

In the Supreme Court of
the United States

Mostafa Aram Azadpour
(Petitioner),
v.
Sun Microsystems, Inc.,
Matrix Absence Management, Inc.,
Babu Turumella, and
Norman Yeung
(Respondents).

On Petition for Writ of Certiorari to
the United States Court of Appeals for
the Ninth Circuit in
San Francisco

Reply Brief to Respondents' Brief in Opposition

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I. Table of Contents

II. Table of Authorities

- US Supreme Court Opinion

III. Summary

A.

Petitioner received Respondents' Opposition Brief to his Petition for Writ of Certiorari to the Ninth Circuit on March 02, 2009 which was filed on February 27, 2009.[1] Respondents' having stated no substantive opposition or opposition with merit, wherefore Petitioner prays for a grant of his said Petition (if not summarily grant-vacate-remand with instruction to remand to state-court).[2]

Brevity is gold in writing one's petition and reply. However, Respondents continually write "fables" requiring extensive citation to record and detailed analysis of their cited authorities and why their case-laws do not suffice.

B.

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[1] The Petitioner submitted his Reply Brief, timely, by March 09, 2009. Due to an inadvertent mistake in the number of word-count, Petitioner received a courtesy phone-call from the Court Document Control Clerk on March 12, 2009 informing him that his Reply Brief had exceeded the allotted word-count, the instant Reply Brief constitutes the reduced word-court Reply Brief.

[2] While it is not subject of instant Petition; however, to note that matter of jurisdiction, as-matter-of-law, had been timely questioned; the Petitioner did take an appeal from the order denying remand (*see* Pet. App.: "N," pgs(2-3)) under Dkt No. 06-16294 in July of 2006 (*see* C05-04087-MJJ Docket ID(140)).

Respondents cite from Trial Court (*see* Pet. at 7) order granting them summary-judgment. *See* Opp. Brf. at 9; and, Pet. App.: "J." Within the omitted citation is:

> "<williams v. genetech, inc., 74 cal.app. 4th 215, 226 (1999)>."

which appears in verbatim in Respondents summary-judgment-motion. When a citation has its party's name, and reporter's volume/page, and decision-date "all" erroneous one can not but to pause and to wonder. The Trial Court states it "finds" (or found); however, no citation to indicate based upon which exhibit(s) of Respondents. Therefore, it is rather impossible to assign errors or to challenge such "findings." Summary-dismissal is "not" the purpose of Fed. R. Civ. P. *See* Surowitz v. Hilton Hotels Corp., 383 US 363, 373 (1966).

C.

Respondents removed a not well pleaded complaint "without" doing as little as having deposed then Plaintiff, before case-removal,[3] to ensure that which Respondents in their Opposition Brief (and other papers/briefs in lower-courts) have referred to as "implied" (*see* Opp. Brf. at 1) is not a figment of their "imagination."

"Implication" is not within the well pleaded complaint doctrine.

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[3] *See* Pet. App.: "O," pg(5).

D.

The Independent Medical Examiner/Evaluator ("IME") hired solely at the discretion of Respondent(s), in his objective-medical Report[4] (after having reviewed previous medical records and interviewing/examining the Petitioner) wrote:

> "He [i.e., Mostafa A. Azadpour] does want to produce and does want to return to work."

The IME submitted the said Report as a sworn-to Report and his specialty was being a medical-doctor in psychology and forensic psychiatry; Mark Snyder, MD.

E.

In the "context" of FEHA,[5] any reasonable accommodation to enable a qualified person seeking a reasonable accommodation to perform his/her work; should be "result" of a "timely" and interactive discussion between employee (or his/her duly known representative) and employer (or its duly known representative). Allegation of a timely, interactive, and in good-faith needs to be supported by evidence and not mere averment.

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[4] The said Report was dated December 08, "2003," and was sent to then Defendant Matrix Absence Management, Inc. A redacted-partial of the said Report is in-record of lower-courts.

[5] FEHA: Fair Employment & Housing Act; California Government Code § 12900, et seq.

Here is a partial of an e-mail[6] from Respondent Sun Microsystems, Inc. ("SMI," "Sun," or "SUN") (former employer of Petitioner), human-resource with some imbedded comments from Petitioner:

> "... [March 02, 2004] I [, i.e., Wendy Dunham] don't know why I didn't pass this on sooner [, i.e., in December of 2003 to tell Petitioner that Petitioner needed to contact another group for grievance handling and accommodation request and that this human-resource was not the right person, however, it took her some 3-months to find out she is not the right person; although, she stated, in the same e-mail, that she had worked with this other group before and praised their work, i.e., had prior knowledge of that "other" group] ... I [, i.e., Wendy Dunham] have been very pleased with their [sic] on behalf of employees and managers in PNP ["PNP" stood for processor-and-network-products group]..."[7]

IV. Memorandum of Argument in Reply

1. Respondents Continually Engage in Fraud-on-Court

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[6] Petitioner disclosed such documents during the initial document discloser in C05-04087-MJJ; and, authenticated by the Custodian of Record for Petitioner's Internet Service Provider, the American Telephone & Telegraph; in response to a subpoena served upon the said Custodian of Records.

[7] This is in record of Appeals in Ninth Circuit as Supplemental Excerpts of Record, Vol. 01, Tab-11, pg(1025), from records in C05-03272-MJJ/C06-04087-MJJ.

Respondents by-and-thru Counsel have and continue to engage in fraud-on-court and fraud-on-party. Brief in Opposition at 3 § B. Factual Summary is anything but factual. No citation was made to any exhibit or even a docket entry-number for any of the lower-courts to support "fables" Respondents are presenting as "facts."

The characterization of "morphed" is rebutted by competent medical records, e.g., the IME's Report, hospital record; which Petitioner, then Plaintiff, placed in record (to the point of not being medically confidential) as exhibits. For example: exhibits attached to then Plaintiff's reply to opposition-to-remand in C05-04087-MJJ, Docket IDs (36 & 38); exhibits attached to then Plaintiff's declaration no. 1 in support of sanctions against defendants and their attorneys in C05-04087-MJJ, Docket ID (214); exhibits attached to then Plaintiff's declaration no. 3 in support of his motion for partial summary judgment in C05-04087-MJJ, Docket ID (223).

Petitioner was hospitalized and was on a temporary certified disability in "March" of "2003" not due to any foot surgery, but diagnosed with depression caused/triggered by undue and unreasonable circumstances at work. "No" competent medical doctor, including the IME, would give a certificate of return-to-work to Petitioner; without a change (or examination) of work-circumstances which lead to, or triggered, the said diagnosed depression. Additionally, any return-to-work required a restructuring, e.g., start off on a part-time bases.

Respondents and their Counsel "must" stop this continued fraud-on-court.

2. Why Is It Not Possible to Show a Clear Conflict Among Circuits in re to Case on Bar

Trial Court took removal-jurisdiction pursuant to ERISA[8] "conflict preemption." *See* Pet. pgs(10-13), and, App.: "O." The Ninth Circuit concluded removal-jurisdiction pursuant to ERISA "complete preemption." While the Ninth Circuit did not state where in the removed-state-complaint it found "negligence" against ERISA-plan. *See* Pet. App.: "D," pg(3). That is a conflict.

Neither FEHA nor WARN Act[9] have any statutory intent or cause-effect reliance on SMI's ERISA-plan in the not well pleaded state-complaint (or later in the Fist Amended Complaint ("FAC")). Just because FEHA and WARN Act may require any unjustly denied or withheld "benefit" to be paid to the prevailing employee-plaintiff; that does not make such statute (in the context of ERISA): "... relate to any employee benefit plan."

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[8] ERISA: the Employee Retirement Income Security Act of 1974; 29 USC 1001, et seq.

[9] WARN Act: Worker Adjustment and Retraining Notification Act; 29 USC 2101, et seq.

Since about 1997 on-ward,[10] no Circuit has upheld a state-case removal in a non-diversity case when a substantial state-cause is involved over which that Circuit's US district court has-had no original subject-matter jurisdiction when the defendant removing the state-case had only a colorable "conflict preemption" available to it under ERISA.

The underlying state-cause *in re* to the case on bar, i.e., FEHA, is exclusive to the State of California; therefore, no "conflict" could be among Circuits on that question of law. As Petitioner noted in his Petition, with an opportunity to expand on them in a merit-brief; other Circuits, namely that of the Fifth, Sixth, and Seventh; have held that civil-right state-causes are "not" preempted by ERISA to make such a state-case removable, when as part of damages sought is any back "benefit." *See* Pet. at 28.

The "relate to" ERISA clause has more to it than what Respondents noted in their Opposition Brief. *See* Opp. Brf. at 7. The "missing-link" (as it were) is (*see* 29 USC 1144(a)):

> "... relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975."

When reading 29 USC 1003 (a) & (b); then neither FEHA, WARN Act, nor other such other causes of action in the not well pleaded state-complaint had

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[10] *See* California Division of Labor Standard Enforcement v. Dillingham Construction, N.A., Inc., 519 US 316 (1997).

"any" intent to manage, regulate, fund, etc. "any" benefit-plan (be the "plan" ERISA based or not).

As Petitioner, authoritatively cited in his Petition; the Ninth Circuit's own holdings on matter of ERISA standing and mootness; clearly are opposite to the dispositive memorandum in appeals on bar. *See* Pet. App.: "D;" and, Pet. § VIII.3.B.

3. Original Jurisdiction Does Not Mean Exclusive Jurisdiction

ERISA code § 502(e)(1) (a.k.a., 29 USC 1132(e)(1) referring back to 29 USC 1132(a)(1)(B)) gives expressed "concurrent" jurisdiction to a US district court "and" a state court-of-compete, e.g., State Court of Origin (*see* Pet. at 6), to hear civil-suit for recovery of ERISA-benefit brought by a beneficiary under ERISA code § 502(a)(1)(B) (a.k.a., 29 USC 1132(a)(1)(B)).

The 28 USC 1441(a) in relevant part reads:

> "Except as otherwise expressly provided by Act of Congress, ..."

In a non-diversity case, as case on bar; reading 29 USC 1132(e)(1), 29 USC 1132(a)(1)(B), and 28 USC 1441(a) together; it is crystal-clear, that Congress expressly gave jurisdiction to a state court-of-competent to hear "and" to adjudicate benefit-denied cause of action even when benefit-plan is an ERISA qualified benefit-plan.

A defendant while not waiving any federal defense available to him/her; may remove a state-case within one-year of its inception at a state-court; if/when it becomes apparent that state-case is made removable. *See* 28 USC 1446(b).

Clearly "ripeness" attribute of the federal justiciability doctrine escaped Respondents' attention.

4. Terms Need Context and Footing in Record

Aside from Article III case/controversy requirement, it is a well settled holding of instant Court that just because a federal statute may appear on the face of one's complaint; that, alone, does not make a state-case into a federal case. Additionally, a term/word used in one's complaint needs to be given a "context."

When for example, Petitioner, then Plaintiff, in his state-complaint noted 401(k) as an example of loss he suffered (*see* Pet. App. "K" pg(5)), that pre-income-tax "voluntary" contribution was available "only" for employees who were in "active-status." An employee on a non-active statues (whether off on medical needs or kept off by manufactured delay; as Petitioner suffered); could not contribute to his/her 401(k) account. Under SMI's benefit-package; enrollment in 401(k) was voluntary and management of 401(k) account was left to the employee; i.e., the SMI's 401(k) was not a qualified ERISA-pension-plan (neither did SMI ever claim that it offered an ERISA-pension-plan, nor, did Petitioner ever claim that he was offered an ERISA-pension-plan by SMI). SMI

had a matching program, too; available only to employees who had already voluntarily signed up to participate in 401(k) program, and, were in active employment-status. The matching was denied from Petitioner, too; i.e., Petitioner suffered further loss, for he was not on an active-employee status.

The instant Court has required context to be given when ERISA related suit and terms are on bar. *See* Howard Delivery Service, Inc. v. Zurich American Insurance Co., 547 US 651, 670 (2006); and, Aetna Health Inc. v. Davila, 542 US 200, 313 (2004).

Howard Delivery Service, Inc. v. Zurich American Ins. Co. at 675 citing from US v. Reorganized CF&I Fabricators of Utah, Inc., 518 US 213, 219-224 (1996) states:

> "The definition of a term in one statute does not necessarily control the interpretation of that term in another statute, for where the purposes or contexts are different the terms may take on different meanings."

In the context of FEHA, an employee-plaintiff prevailing on his/her discrimination suit is entitled to recover "any" past benefit due him/her. In the context of WARN Act, a qualified employee laid off is entitled to receive 60-calander-days of "any" benefit due him/her. Neither FEHA nor WARN Act cares or controls what such "benefit" may be or should be; or, even to have any benefit. Neither FEHA nor WARN Act were enacted with an "intent" to control, regulate, define, etc. what an employer's "benefit" plan may be, or, even requiring an employer to have

a "benefit" plan. Neither FEHA nor WARN Act requires any "extra" plan benefit (even when an employer has a benefit plan) to be granted to the prevailing employee-plaintiff.

Aetna Health Inc. v. Davila at 212 states:

> "The duties imposed by the THCLA [THCLA: Texas Health Care Liability Act] in the context of these cases, however, do not arise independently of ERISA or the plan terms [hence the state-case was made removable pursuant to ERISA pre-empting civil remedies not authorized within the civil-enforcement of ERISA scheme]."

However, *in re* to case on bar; the "duties" FEHA or WARN Act set are "independent" of ERISA-benefit "and" ERISA-plan SMI (or any California employer) may had put in-place. FEHA "duty" is the same even if a California-employer does "not" any ERISA-plan/benefit.

5. Analysis of Authorities Cited in Respondents' Opposition Brief

The authorities cited in Respondents' Opposition Brief are not on-point or persuasive for following: (1) not same or similar in procedural background to case on bar, (2) not same or similar on cause of action to case on bar, (3) not addressing lack of ERISA standing on part of Defendants to remove state-case or to maintain state-case in US district court, (4) not addressing lack of US district court's subject-matter jurisdiction both at removal date and judgment entry

date, and (5) not addressing implied "stuff" imagined by Defendants and their Counsel.

In case on bar, Petitioner's alleged breach of contract and/or good-faith dealing is/are *in re* to the "written" offer-of-employment letter SMI and Petitioner executed and SMI not following its written human-resource policies,[11] and, while allowing other employees affected by project-cancelation to seek jobs within SMI; not offering the same "opportunity" to Petitioner. Also, Petitioner alleged violation of his rights-and-privileges "under" FEHA. SMI was not and is not a unionized employer (nor did Petitioner ever alleged otherwise).

Respondents cite the following at various pages of their Opposition Brief:

Devoll v. Burdick Painting, Inc., 35 F.3d 408, 9th Cir. (Cal.) (1994); Ellenburg v. Brockway, Inc., 763 F.2d 1091, 9th Cir. (Cal.) (1985); Ingersoll-Rand Co. v. McClendon, 498 US 133 (1990); Lea v. Republic Airlines, Inc., 903 F.2d 624, 9th Cir. (Nev.) (1990); Reddam v. KPMG LLP, 457 F.3d 1054, 9th Cir. (Cal.) (2006); and, Sparta Surgical Corp. v. National Assn. of Sec. Dealers, Inc., 159 F.3d 1209, 9th Cir. (Cal.) (1998).

Devoll v. Burdick Painting, Inc., is not a non-diversity removed state-case which included state-cause. Extra plan cause of "breach of contract" was brought against ERISA-plan causing "complete

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[11] The said written offer-of-employment letter had terms-and-conditions.

preemption." The former employee suing was a union-member, whose grievance over a collectively bargained salary-and-benefit may be heard in a US district court aside from ERISA cause of action.

Ellenburg v. Brockway, Inc. is not a non-diversity removed state-case which included state-cause. Extra plan cause of "breach of implied covenant of good faith and fair dealings" brought against ERISA-plan causing "complete preemption." The employee was seeking "pension" ERISA-benefit, and, employee was alleging interference with his rights "under" the ERISA-plan.

Ingersoll-Rand Co. v. McClendon plaintiff brought a Texas state suit stating that he was fired, so that his employer would/could avoid having to pay for his "pension" (an ERISA-pension-plan). ERISA has its own enforcement of violation of rights-and-privileges "under" the terms of an ERISA-plan. "McClendon" should have utilized ERISA's civil-remedy to enforcing his rights "under" ERISA-plan.

However, *in re* to case on bar; the Petitioner's then Plaintiff's state-complaint was "not" alleging he was laid off so that SMI would not pay him ERISA long term disability benefit (which pursuant to the terms of the plan had a 2-year maximum duration and would stop, regardless of being laid off or not). The Petitioner then Plaintiff in his state-complaint (which was further refined in his FAC) claimed that he was laid off for "type" of disability he suffered, i.e., depression as oppose to a physical disability and that he was prevented to participate in "any" internal job search because of his disability. Whereas, FEHA sets

a duty upon "any" California employer (which meets the minimum number of employees set by FEHA) not to discriminate based upon one's disability (be it temporary, physcial, etc.). FEHA sets such a duty upon such a California employer "regardless," i.e., independent, of whether or not such an employer has any ERISA-qualified-plan or not.

Lea v. Republic Airlines, Inc. is "not" a state-case removed when its US district court not having had a subject-matter jurisdiction over state-cause. Also, negligence, breach of contract, etc. were asserted against ERISA-plan, i.e., negligence and such causes were "not" independent of ERISA-plan, therefore, "complete preemption" took place.

Reddam v. KPMG LLP is on a remand ordered by its US district court when its US district court erroneously considered it "lacked" subject-matter jurisdiction.

However, the matter on instant Petition is that the Trial Court lacked jurisdiction, both, at "removal" and "judgment-entry" dates.

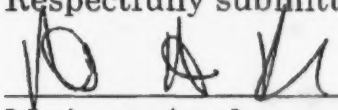
Sparta Surgical Corp. v. National Ass'n of Securities Dealers is not persuasive or guiding. The Respondents misunderstood (if not wholly confused). The statute appealed to in the said case is "exclusively" heard in a US district court. Therefore, dismissing that-cause would mean there was "no" case to be had to be remanded or not. Additionally, the defendant in the said case had an "affirmative-defense-in-law" of "immunity" available to it (nothing

of this sort was, is, or has-been available to any Respondent(s) then Defendant(s)).

V. Conclusion

Pursuant to the foregone, the instant Petitioner respectfully prays that his Petition for a Writ of Certiorari to the Ninth Circuit to be granted as the Respondents' produced no *meritus* or substantive opposition in their Brief in Opposition.

Respectfully submitted,



M. Aram Azadpour, *pro se* Petitioner
Date: March 12, 2009

ORIGINAL

NO. 08-995

In the Supreme Court of the United States

Certificate of Compliance

I, the named *pro se* Petitioner on the attached Reply Brief, pursuant to US Code, Title 28, § 1746 certify that in compliance with the US S.Ct. R. 33.1, et seq., the attached Reply Brief to Respondents' Brief in Opposition is:

Proportionately spaced, has a typeface of <12> points in the body and <10> points in the footnote, with typeset of <Century Schoolbook> and contains <2,995> words in total.

Date: March 12, 2009

M. Aram Azadpour, *pro se* Petitioner